No. 2002

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

G. HEILEMAN BREWING COMPANY,

Appellant,

vs.

THE INDEPENDENT BREWING COMPANY,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the United States Circuit Court for the Western District of Washington, Northern Division.

Lowman & Hanford Co., Seattle

Records of U. S. Circuit Court of Appeals

688

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INDEX.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

G. HEILEMAN BREWING COMPANY,
Complainant and Appellant,
vs.
THE INDEPENDENT BREWING COMPANY,
Defendant and Appellee.

No. 1953.

NAMES AND ADDRESSES OF COUNSEL.

G. WARD KEMP, Esq.,
Burke Building, Seattle, Washington.

EDWARD T. FENWICK, Esq., of Counsel,
600 F Street, Washington, D. C.

L. L. MORRILL, Esq., of Counsel,
600 F Street, Washington, D. C.

Solicitors for Complainant and Appellant.

RICHARD SAXE JONES, Esq.,
Colman Block, Seattle, Washington.
Solicitor for Defendant and Appellee.

Circuit Court of the United States for the Western District of Washington, Northern Division.

G. HEILEMAN BREWING COMPANY, *Complainant,* vs. THE INDEPENDENT BREWING COMPANY, *Defendant.*	No. 1953.

To the Honorable, the Judges of the Circuit Court of the United States for the Western District of Washington, Sitting in Equity:

G. Heileman Brewing Company, of the City of La Crosse, County of La Crosse and State of Wisconsin, and a citizen of said state, brings this its bill of complaint against the Independent Brewing Company, of Seattle, in the County of King and State of Washington, and a citizen of said state, and thereupon your orator complains and says:

That your orator is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, having its principal office and place of business in the City of La Crosse, County of La Crosse and State of Wisconsin, and a citizen of the said state.

Your orator further shows unto your Honors upon information and belief that the defendant is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Washington, having its principal office and place of business in the City of Seattle, County of King and State of Washington, and a citizen of said state, but as to the facts relative to said incorporation your orator has no definite knowledge.

Your orator further shows unto your Honors that for more than eight years preceding the commencement of this action your orator has manufactured at the City of La Crosse a certain high quality of beer which it has marked and designated by the use of a label, a copy of which is annexed hereto and made a part hereof and marked Exhibit A. That said label has been employed for the purpose of identifying the true and genuine product of your orator and the quality of the goods bearing such mark.

Your orator further shows unto your Honors upon information and belief that prior to the adoption of said label and mark by your orator said label and mark had not been used by others to designate the same of a similar kind of goods and that the said label and mark was original with your orator and does now and always has designated the true and genuine manufacture of your orator except for the use hereinafter complained of by the defendant.

That being so the owner of the said label and mark your orator did, on the twenty-third day of June, 1906, file in the United States Patent Office an application for the registration of its said trade-mark, which said application bore serial number 20526, that thereupon your orator complied with all the requirements and rules of the Patent Office and with the statutes in such cases made and provided, to the end that on the twenty-fifth day of June, 1907, a certificate of registration did issue out of the Patent Office in the name of the United States and bearing the seal of the Patent Office and duly signed by the Acting Commissioner of Patents, which said registration bears number 63492, certified copy of which is hereto annexed and made a part hereof and marked Exhibit B.

Your orator further shows unto your Honors that the use of a mark for designating beer which consists essentially of a conventional or typical Dutch or German scene with an inn and table surrounded by drinkers and with a subterranean or underlying passage, recess or room showing vats, barrels or other receptacles such as are ordinarily employed for storing

beer, together with a scene of a cooper or coopers making or working upon the building of a barrel or butt, was original with your orator, and has been used by your orator exclusively for designating the beer of your orator's manufacture for more than eight years last past, and but for the pirating of said mark by the defendant as hereinafter complained of your orator would now be in the exclusive use of said mark.

Your orator further shows unto your Honors that since the adoption of said mark in or about the first day of January, 1902, your orator has continuously and uninterruptedly used the said mark and label by applying the same directly to bottles and other receptacles containing beer of your orator's manufacture, which said beer has been shipped, transported and sold in interstate commerce between the State of Wisconsin, the state of its manufacture, and many other states of the United States.

Your orator further shows unto your Honors that it has expended large sums of money and a great amount of labor in the perfecting, advertising and exploiting of its said beer to the end that the quality of said beer shall and has become known to the public, and that the public by reason of such excellence of quality and by such exploiting has come to know the beer the manufacture of your orator as and for a high grade and quality of beer, and to know that said beer is designated by the mark and label attached hereto and marked Exhibit A, and that said beer is purchased and designated by the purchasing public by the said mark and label appearing upon said beer and in accordance with Exhibit A as aforesaid.

Your orator further shows unto your Honors that it is now and always has been since on or about the first day of January, 1902, the sole and exclusive owner of the said mark and label represented by Exhibit A hereto attached, and that it is now entitled to the sole and exclusive use of said mark and label in the designation of its product, and entitled to relief against any and all persons, corporations, companies or business associations using said mark or any mark simulating said

mark or which is calculated to be confused with said mark or any mark in the semblance of the scene or scenes appearing upon your orator's mark and label as exemplified by Exhibit A.

Your orator further shows unto your Honors that with full knowledge in the premises and of the reputation of your orator's beer and of the demand existing for the same and in the use and meaning of your orator's said mark and label consisting of the Dutch or German drinking scene with the subterranean room or passage containing barrels or butts as indicating and identifying the quality, origin and genuineness of your orator's beer the defendant, the Independent Brewing Company, of Seattle, in the County of King and State of Washington, the corporation as aforesaid, meaning and intending to divert and secure to itself such portions of the good will of your orator's business in manufacturing and selling beer and to destroy for its own profits by unlawful means the reputation of and demand for your orator's beer wholly without your orator's consent and against its repeated protests has manufactured and sold beer of a quality different from and inferior to your orator's beer in this district and elsewhere, and has used upon such beer in connection with the sale of the same your orator's trade-mark in so nearly the exact form and configuration as employed by your orator as to deceive purchasers into believing that the beer the manufacture of the defendant was and is the beer manufactured by your orator, and to confuse and defraud the public into purchasing the defendant's beer believing it to be the beer of your orator.

That your Honors may be fully advised of the flagrant imitation of your orator's trade-mark and label employed by the defendant and used upon beer of the defendant's manufacture in derrogation of the rights of your orator, your orator has attached hereto and made a part hereof a label employed by the defendant upon beer manufactured by the defendant and sold in competition with and being confused as and for the beer of your orator's manufacture, and has marked said label Exhibit C.

Your orator further shows unto your Honors that the defendant employs the label exemplified by the Exhibit C in the same manner as your orator employs the label exemplified by Exhibit A upon the true and genuine manufacture of your orator, namely, by attaching the said label directly to bottles containing the beer of the manufacture of the defendant. That the bottles to which said labels of your orator as exemplified by Exhibit A and the infringing label and mark as exemplified by Exhibit C are cylindrical in form and of such proportion that the labels exemplified by Exhibits A and C when so attached to bottles as aforesaid are not visible in their entirety but only in sections, and that certain sections of the label exemplified by Exhibit C more nearly resemble corresponding sections of your orator's label exemplified by Exhibit A than as is the case with other sections.

Your orator further shows unto your Honors on information and belief that the defendant has sold beer not manufactured by or for your orator bearing the said fraudulent trade-mark and label among the several states of the United States and has without your orator's consent reproduced, counterfeited, copied and plainly and obviously imitated your orator's said trade-mark and label to your orator's great loss and injury.

Your orator further charges that by reason of the counts and premises of the defendant aforesaid your orator's trade has been unlawfully interfered with and profits which by right belonged to your orator have been unlawfully diverted to the defendant, and that the defendant continues to unlawfully interfere with and divert your orator's business and the profits therefrom to its own use and behoof, and that the public has been and continues to be misled, and that the beer the manufacture of the defendant has been and continues to be sold as and for the true and genuine beer of your orator's manufacture for many years known and in demand as hereinbefore set forth, and that the use by the defendant of the said in-

fringing mark of your orator and of his peculiar configuration displayed thereon has the effect of enabling and promoting the impairment of the reputation of and the demand for your orator's beer, and the fraudulent and unlawful sale and substitution of the defendant's beer as and for the beer of your orator's manufacture to your orator's great loss and injury and to the great loss and injury of the public.

Your orator further shows unto your Honors that the good will of its said business of manufacturing and selling the particular beer designated by the trade-mark and label exemplified by Exhibit A is of great value, amounting to many thousands of dollars and more than ten thousand dollars annually, and the value of its right to the exclusive use of its trade-mark and label exemplified by Exhibit A and its particular configuration and the scene appearing thereon is to the value of many thousands of dollars and more than three thousand dollars annually, and it cannot with certainty state the amount it is entitled to recover from the defendant by reason of its infringement of your orator's said trade-mark and label, and upon information and belief your orator charges that the amount which it is entitled to recover by this suit and by reason of the counts of said defendant above recited amounts to more than the sum of three thousand dollars.

For inasmuch as your orator can have no adequate relief except in this Court, and to the end therefore that the defendant may if it can show why your orator should not have relief herein prayed for your orator prays as follows:

That a writ of subpoena directed to said defendant commanding it on a day certain therein to be named to appear and answer this bill of complaint and abide and perform such orders and decrees in the premises as to this Court may seem meet, and may be required by the principles of equity and good conscience shall issue out of and under seal of this Court.

That the said defendant shall, according to the best and utmost of its or its officers' knowledge, remembrance, informa-

tion, belief and records make to the matters and facts hereinbefore stated and charged, full, direct and true and perfect answer, not, however, under oath, an answer under oath being hereby expressly waived.

That the defendant may be adjudged and decreed to account for and pay to your orator the profits or gains thus unlawfully derived from the pirating of your orator's rights as well as the damages sustained by your orator by reason of the infringement of your orator's rights complained of, and that upon entering decree against the defendant your Honors may proceed to assess or cause to be assessed under your direction defendant's unlawful profits or income as also in addition thereto the damages sustained by your orator by reason of the defendant's infringement and piracy, and that the Court may increase the actual damages so assessed and found to a sum of three times the amount of such assessment as by statute in such cases made and provided.

That writ of injunction may issue from and under the seal of this Honorable Court *pendente lite* enjoining and restraining the defendant, its officers, servants, employees, associates, attorneys, solicitors, clerks, workmen and agents from further sale or use of the said infringing trade-mark and label or any material or misleading part thereof pending the determination of this cause.

That a writ of injunction may be issued from and under the seal of this Honorable Court perpetually enjoining and restraining the said defendant, its officers, associates, attorneys, solicitors, clerks, servants, workmen, agents, employees, and all in privity with it or them from in any manner further manufacturing, selling or using the trade-mark of your orator or any mark in similarity thereof and in violation of your orator's rights.

Your orator further and finally prays that equity may be done and the relief above prayed for and all other relief that

it may be righteous in the premises to administer may be afforded your orator as to your Honors may seem meet.

G. HEILEMAN BREWING CO.
By G. WARD KEMP,
Solicitor for Complainant.
Seattle, Wash.

EDWARD T. FENWICK,
L. L. MORRILL,
Of Counsel.
600 F Street, Washington, D. C.

State of Wisconsin,
County of La Crosse.—ss.

Emil T. Mueller being duly sworn on oath deposes and says: That he is secretary of the complainant corporation; that he has read the above and foregoing Bill of Complaint, and knows the contents thereof, and that the same is true of his own knowledge except those matters therein stated upon information and belief, and as to those matters he believes it to be true; that this verification is made on behalf of the complainant for the reason that the complainant on account of its corporate existence is unable to make the verification on its own behalf, and that such verification is made with the full knowledge and under the direction of the board of directors of said corporation.

EMIL T. MUELLER.

Subscribed and sworn to before me this 30th day of January, 1911.

(Seal) THOS. H. BAILEY.
Notary Public for La Crosse County, Wisconsin.

My commission expires February 4th, 1912.

"Exhibit A"

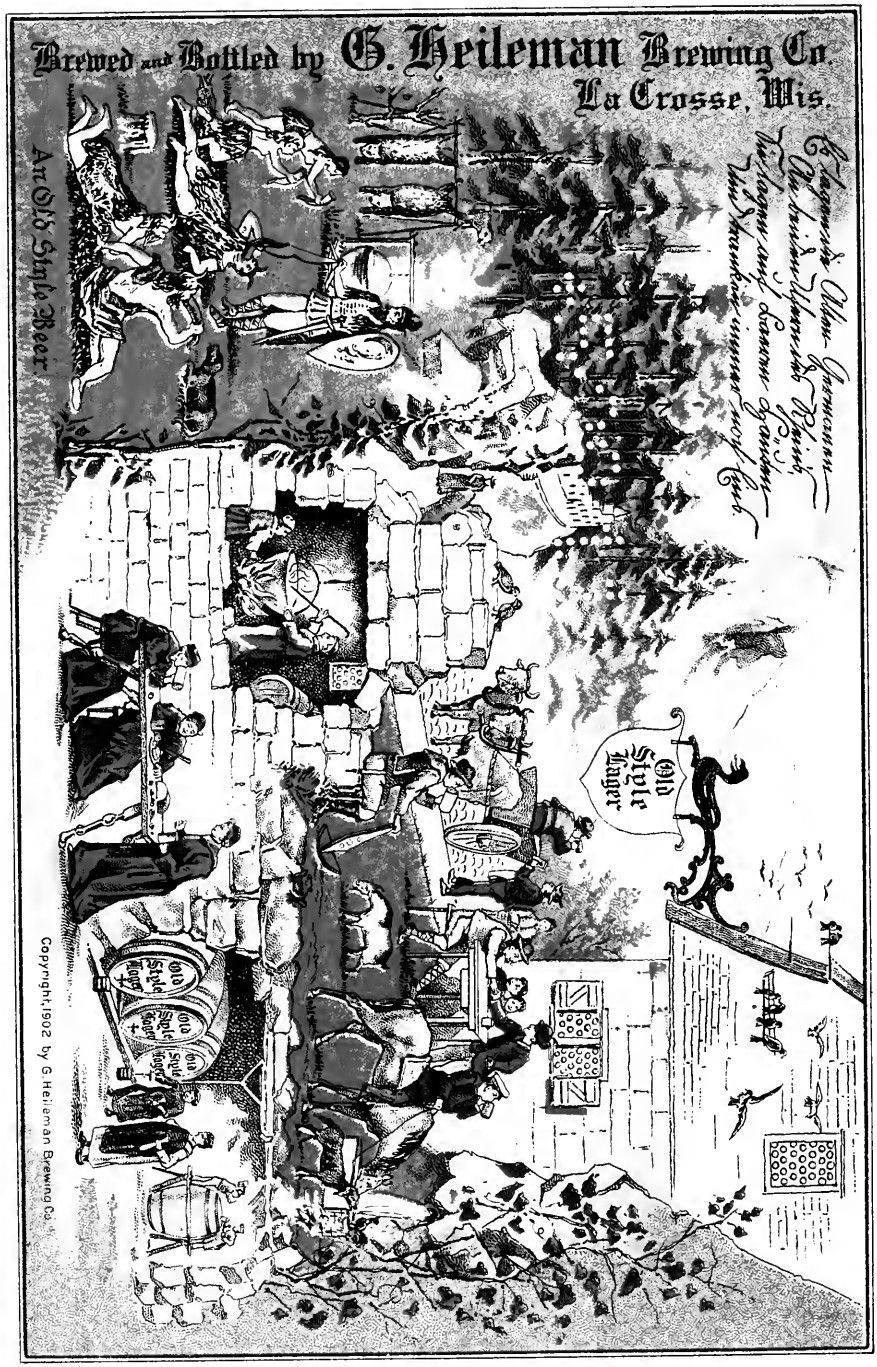
Brewed and Bottled by G. Heileman Brewing Co.
La Crosse, Wis.
Old Style Lager
Old Style Lager
Old Style Lager
Old Style Lager
Old Style Lager
An Old Style Beer
Copyright 1902 by G Heileman Brewing Co

EXHIBIT B.

DEPARTMENT OF THE INTERIOR.

UNITED STATES PATENT OFFICE.

To All Persons to Whom These Presents Shall Come, Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the records of this office of the Certificate of Registration, Statement, Declaration, and Drawing in the matter of the Trade-Mark registered by G. Heileman Brewing Co., June 25, 1907, Number 63,492, for Beer.

The Certificate of Registration was granted for the term of twenty years, and so far as is disclosed by the records of this office, said Certificate is still in full force and effect.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington this 2nd day of December, in the year of our Lord one thousand nine hundred and ten and of the Independence of the United States of America the one hundred and thirty-fifth.

(Seal) F. A. TENNANT,

Assistant Commissioner of Patents.

No. 63,492.

THE UNITED STATES OF AMERICA.

To All to Whom These Presents Shall Come:

THIS IS TO CERTIFY that by the records of the United States Patent Office it appears that G. Heileman Brewing Co., of La Crosse, Wisconsin, a corporation organized under the laws of the State of Wisconsin, did on the 23rd day of June, 1906, duly file in said office an application for REGISTRATION of a certain

TRADE-MARK

for Beer, that it duly filed therewith a drawing of the said Trade-Mark a statement relating thereto, and a written declaration, duly verified, copies of which are hereto annexed, and has duly complied with the requirements of the law in such case made and provided, and with the regulations prescribed by the COMMISSIONER OF PATENTS.

And upon due examination thereof, it appearing that the said applicant is entitled to registration of its said Trade-Mark under the law, the said Trade Mark has been duly registered to G. Heileman Brewing Co., and its successors or assigns, in the UNITED STATES PATENT OFFICE, this 25th day of June, 1907.

This Certificate shall remain in force for twenty years, unless sooner terminated by law.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the City of Washington, this twenty-fifth day of June, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-first.

(Seal)

C. C. BILLINGS,
Acting Commissioner of Patents.

No. 63,492.

THE UNITED STATES OF AMERICA.

To All to Whom These Presents Shall Come:

THIS IS TO CERTIFY that by the records of the United States Patent Office it appears that G. Heileman Brewing Co., of La Crosse, Wisconsin, a corporation organized under the laws of the State of Wisconsin, did on the 23rd day of June, 1906, duly file in said office an application for REGISTRATION of a certain

TRADE-MARK

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And upon due examination thereof, it appearing that the said applicant is entitled to registration of its said Trade-Mark under the law, the said Trade Mark has been duly registered to G. Heileman Brewing Co., and its successors or assigns, in the UNITED STATES PATENT OFFICE, this 25th day of June, 1907.

This Certificate shall remain in force for twenty years, unless sooner terminated by law.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the City of Washington, this twenty-fifth day of June, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-first.

(Seal)

C. C. BILLINGS,
Acting Commissioner of Patents.

TRADE-MARK.

No. 63,492.

REGISTERED JUNE 25, 1907.

G. HEILEMAN BREWING CO.

BEER.

APPLICATION FILED JUNE 23, 1906.

PROPRIETOR

G. Heileman Brewing Co.

BY

Mason, Fenwick & Lawrence

ATTORNEYS

UNITED STATES PATENT OFFICE.

G. HEILEMAN BREWING CO., OF LA CROSSE, WISCONSIN.

TRADE-MARK FOR BEER.

No. 63,492. Registered June 25, 1907.

Statement and Declaration.

Application filed June 23, 1906. Serial No. 20,526.

STATEMENT.

To All Whom It May Concern:

Be it known that G. Heileman Brewing Co., a corporation duly organized under and existing by virtue of the laws of the State of Wisconsin, and located in the City of La Crosse, in the County of La Crosse and State of Wisconsin, and doing business in said city, has adopted for its use a trade-mark, of which the following is a description.

The trade mark is shown in the accompanying drawing.

The trade mark has been continually used in business by us, and those from whom we derived our title, since about the 1st day of January, 1902.

The class of merchandise to which the trade-mark is appropriated is Class 51—Malt preparations not otherwise classified, and the particular description of goods comprised in said class upon which said trade mark is used is beer.

The trade mark is usually displayed by printing same on labels which are attached to packages containing the goods.

G. HEILEMAN BREWING CO.
By EMIL T. MUELLER, Secretary.

DECLARATION.

State of Wisconsin, County of La Crosse.

E. T. Mueller being duly sworn deposes and says he is secretary of G. Heileman Brewing Co., the applicant named in the foregoing statement; that he believes that the foregoing statement is true; that he believes it to be the owner of the trade-mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said trade-mark, either in the identical form, or in any such near resemblance thereto as might be calculated to deceive; that the said trade-mark is used by the applicant in commerce among the several States of the United States, Wisconsin, Minnesota, South Dakota, North Dakota, Iowa, Illinois, and that the description, drawing and specimens (or facsimiles) presented truly represent the trade-mark sought to be registered.

EMIL T. MUELLER.

Subscribed and sworn to before me a notary public this 21st day of May, 1906.

CARL N. LANGENBACH,

[L. S.] Notary Public, La Crosse, Wis.


Old German Lager
TYPE
PROSIT! ES GIEBT KEIN KOPFWEH
An old type German Lager Beer
Of rare old Age and Rich Quality
BREWED & BOTTLED BY
The Independent Brewing Co.
SEATTLE, WASH.
GUARANTEED BY THE INDEPENDENT BREWING CO. UNDER THE FOOD AND DRUGS ACT, JUNE, 30, 1906.

Endorsed: Bill of Complaint. Filed U. S. Circuit Court, Western District of Washington, Feb. 27, 1911. Sam'l D. Bridges, Clerk, W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

G. HEILEMAN BREWING COMPANY,
Complainant,
vs.
THE INDEPENDENT BREWING COMPANY,
Defendant.

No. 1953.
In Equity.

DEMURRER.

The demurrer of the above named defendant, the Independent Brewing Company, to the bill in equity of complainant herein.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, or otherwise, doth demur to said bill, and for cause of demurrer sayeth:

I.

That said bill does not state facts sufficient to constitute a cause of action in favor of the complainant.

II.

That there appears no equity in the bill.

III.

That it appeareth by complainant's showing in said bill that it is not entitled to the relief prayed for, nor to any other form of relief, against the defendant.

IV.

That it appeareth by said bill that complainant's claim of right to relief is based upon the fraud of complainant itself, and other fraud, and such bill should be dismissed.

Wherefore, and for divers other good causes of demurrer appearing on said bill, this defendant doth demur thereto, and prays the judgment of this Honorable Court whether it shall be compelled to plead or make answer to said bill, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

R. S. JONES,
Counsel for Defendant.

Office and Postoffice Address:
409 Colman Bldg., Seattle,
King County, Washington.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

R. S. JONES,
Counsel for Defendant.

United States of America,
District of Washington,
State of Washington,
County of King.—ss.

Samuel S. Loeb, being first duly sworn, on oath says that he is President of the Independent Brewing Company, defendant herein, and that as such he is authorized to make this affidavit in its behalf; that the foregoing demurrer is not interposed for delay.

SAMUEL S. LOEB.

Subscribed and sworn to before me this 6th day of March, 1911.

(Seal) R. S. JONES,
Notary Public in and for the State of Washington, residing at Seattle.

Due and timely service of a copy of the within demurrer is admitted this 7th day of March, 1911.

G. WARD KEMP,
Attorney for Ptf.

Endorsed: Demurrer. Filed U. S. Circuit Court, Western District of Washington, March 9, 1911. Sam'l D. Bridges, Clerk, W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

G. HEILEMAN BREWING COMPANY,
Complainant,
vs.
THE INDEPENDENT BREWING COMPANY,
Defendant.
No. 1953.

ORDER SUSTAINING DEMURRER.

This cause came regularly on for hearing on the 13th day of March, 1911, upon the demurrer of the defendant to the bill of complainant, and the said complainant being present and represented by G. Ward Kemp, its attorney, and the Independent Brewing Company being present and represented by its attorney, and the Court having heard the arguments of counsel, having considered the bill of the complainant and the demurrer of defendant, and being fully advised in the premises, doth hereby order that the said demurrer be, and the same is hereby sustained.

It is by the Court further ordered that said complainant

have, and it is hereby given twenty (20) days within which to amend its bill, or to elect whether it will stand upon its bill.

Done in open Court this 15th day of March, 1911.

C. H. HANFORD, Judge.

Exception reserved and allowed. O. K. in form.

G. WARD KEMP.

Endorsed: Order Sustaining Demurrer. Filed U. S. Circuit Court, Western District of Washington, March 15th, 1911. Sam'l D. Bridges, Clerk, W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

G. HEILEMAN BREWING CO.,
Complainant,
vs.
THE INDEPENDENT BREWING CO.,
Defendant.
No. 1953.

NOTICE OF ELECTION TO STAND ON PLEADING.

To the above named Court and to the defendant and its attorney in the above entitled action:

You will please take notice that the above named complainant elects to stand on its bill.

Dated this 1st day of April, 1911.

G. WARD KEMP,
Solicitor for Complainant.

Service of the within notice by delivery of a copy to the undersigned is hereby acknowledged this 1st day of April, 1911.

R. S. JONES,
Attorney for Dft.

Endorsed: Notice. Filed U. S. Circuit Court, Western District of Washington, April 1, 1911. Sam'l D. Bridges, Clerk, W. D. Covington, Deputy.

In the Circuit Court of the United States, Ninth Judicial Circuit, Western District of Washington, Northern Division.

G. HEILEMAN BREWING COMPANY, *Complainant,* vs. THE INDEPENDENT BREWING COMPANY, *Defendant.*	No. 1953. In Equity.

DECREE.

The above entitled matter coming on to be heard before the Honorable C. H. Hanford, Judge of the above entitled Court, on this 3rd day of April, A. D. 1911, upon the petition of the defendant that a final decree be herein entered; and it fully appearing to this Court that heretofore in this case complainant filed its bill in equity against defendant, and defendant duly appearing thereto filed its general and special demurrer; and that said cause came on to be heard more than twenty days previous to the signing of this decree upon such de-

murrer of defendant; that each party was represented by its respective counsel and solicitor; argument was duly had, and the Court being duly advised in the premises; that thereupon the Court sustained the demurrer of the defendant in all particulars, and an order sustaining the same has heretofore been duly entered in this cause.

And it further appearing that on Saturday, the 1st day of April, 1911, the complainant, through its solicitor, duly served upon the defendant its notice of election to stand upon its bill in equity, and not to plead further, which notice has been regularly filed with this Court;

Now then, it is hereby ordered, adjudged and decreed that the bill in equity of the complainant in this action be dismissed as against the defendant, with prejudice, and that the defendant recover of the complainant its costs and disbursements herein, which are hereby taxed by the Clerk of this Court at $23.30.

Let this judgment be entered.

C. H. HANFORD, Judge.

Endorsed: Decree. Filed U. S. Circuit Court, Western District of Washington, April 3, 1911. Sam'l D. Bridges, Clerk, W. D. Covington, Deputy.

Circuit Court of the United States, Western District of Washington, Northern Division.

G. HEILEMAN BREWING COMPANY,
Complainant,
vs.
THE INDEPENDENT BREWING COMPANY,
Defendant.

No. 1953.
In Equity.

The above named complainant, conceiving itself aggrieved by the decree made and entered herein on the 15th day of March, 1911, and by the judgment signed and filed herein on the 3rd day of April, 1911, in the above entitled cause, does hereby appeal from said order, decree and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and it prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order, decree and judgment were made and entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

G. WARD KEMP,
Solicitor for Complainant.

And now on the 20th day of May, 1911, it is ordered that the foregoing claim of appeal be and the same is allowed as prayed for; it is further ordered that the bond on said appeal be and hereby is fixed at $400.00, *to serve both as an appeal and as a supersedeas bond.*

GEORGE DONWORTH, Judge.

Circuit Court of the United States, Western District of Washington, Northern Division.

G. HEILEMAN BREWING COMPANY,
Complainant,
vs.
THE INDEPENDENT BREWING COMPANY,
Defendant.

No. 1953.
In Equity.

And now comes the complainant and says that in the record and proceedings of the said Court in the above entitled cause and in the decree made and entered therein on the 15th day of March, 1911, there is manifest error, and for error the said complainant assigns the following:

The Court erred in sustaining the demurrer and directing that the bill of complaint be amended or dismissed.

The Court erred in not dismissing the demurrer and sustaining the bill of complaint and requiring the defendant to make answer thereto as therein prayed for.

That the Court erred in entering final judgment dismissing the action as against the defendant with prejudice and in adjudging that the defendant recover its costs and disbursements.

Wherefore the complainant prays that the said decree be reversed.

G. WARD KEMP,
Solicitor for Complainant.

Endorsed: Petition and Claim for Appeal—Allowance and Assignment of Errors. Filed U. S. Circuit Court, Western District of Washington, May 20, 1911. Sam'l D. Bridges, Clerk, B. O. Wright, Deputy.

In the United States Circuit Court for the Western District of Washington, Northern Division.

G. HEILEMAN BREWING COMPANY,
Plaintiff,
vs.
INDEPENDENT BREWING COMPANY,
Defendant.

No. 1953.
In Equity.

BOND ON APPEAL.

Know all men by these presents, that we, the G. Heileman Brewing Company, a corporation organized under the laws of the State of Wisconsin, and having its principal office at the City of La Crosse, in said state, as principal, and the Fidelity and Deposit Company, of Maryland, a corporation organized under the laws of the State of Maryland, and having its principal office at the City of Baltimore, in said state, as surety, are held and firmly bound unto the Independent Brewing Company, a corporation organized, existing and doing business under the laws of the State of Washington, and having its principal office at the City of Seattle, in the County of King, in said State, in the sum of $400.00, to be paid to said The Independent Brewing Company, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our successors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our several corporate seals and dated this 26th day of May, 1911.

Whereas, the above named G. Heileman Brewing Company has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the decree sus-

taining a writ of demurrer entered March 15th, 1911, and a final decree dismissing the bill of complaint in the above entitled suit in the Circuit Court of the United States for the Western District of Washington, Northern Division, in Equity, entered on the 3rd day of April, 1911.

Now therefore, the condition of this obligation is such that if the above named G. Heileman Brewing Company shall prosecute its said appeal to effect and answer all damages and costs, if it fail to make such appeal good, and shall pay all damages and costs which may result to the defendant by reason of said appeal and the costs of the said defendant in the Circuit Court of the United States for the Western District of Washington, and in the Circuit Court of Appeals of the Ninth Circuit, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

(Seal) G. HEILEMAN BREWING COMPANY.
By E. MUELLER, Secretary.

(Seal) FIDELITY AND DEPOSIT COMPANY,
Of Maryland.
JOHN A. WHALLEY, Agent.
By LOREN GRINSTEAD,
Attorney in Fact.

The foregoing bond is hereby approved to operate as a cost supersedeas and appeal bond in said cause.

GEORGE DONWORTH, Judge.

Endorsed: Appeal Bond. Filed U. S. Circuit Court, Westtern District of Washington, May 26, 1911. Sam'l D. Bridges, Clerk, B. O. Wright, Deputy.

In the United States Circuit Court for the Western District of Washington, Northern Division.

G. HEILEMAN BREWING COMPANY, *Plaintiff,* vs. THE INDEPENDENT BREWING COMPANY, *Defendant.*	No. 1953. In Equity.

CITATION.

The United States of America.—ss.

To the Independent Brewing Company, Greeting:

Whereas, G. Heileman Brewing Company has lately appealed to the Circuit Court of Appeals for the Ninth Circuit from a decree lately rendered in the Circuit Court of the United States for the Western District of Washington, Northern Division, made in your favor, the said G. Heileman Brewing Company has filed the security required by law; you are therefore hereby cited to appear before said Circuit Court of Appeals, at the City of San Francisco, in the County of San Francisco, on the 24th day of June next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the City of Seattle, in the County of King, in the Western District of Washington, this 26th day of May, in the year of our Lord one thousand nine hundred and eleven.

GEORGE DONWORTH, Judge.

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington.—ss.

I hereby certify and return that I served the annexed citation on the therein named Independent Brewing Company by handing to and leaving a true and correct copy thereof with A. J. Scheffler, Cashier of the said Independent Brewing Company, personally at Seattle, in said District, on the 27th day of May, A. D. 1911.

JOSEPH R. H. JACOBY,
U. S. Marshal.

May 29, 1911.
Fees, $2.12.

By H. R. ANDERSON, Deputy.

Copies of the foregoing citation on appeal, as well as copies of the petition for appeal and allowance thereof, assignment of errors, and bond on appeal, received, and receipt of the same acknowledged this 26th day of May, 1911.

R. S. JONES,
Attorney for the Independent Brewing Company, Defendant.

Endorsed: Citation on Appeal—Proof of Service. Filed U. S. Circuit Court, Western District of Washington, May 29, 1911. Sam'l D. Bridges, Clerk, B. O. Wright, Deputy.

In the United States Circuit Court for the Western District of Washington, Northern Division.

G. HEILEMAN BREWING COMPANY,
Plaintiff,
vs.
INDEPENDENT BREWING COMPANY,
Defendant.

No. 1953.
In Equity.

PRAECIPE FOR TRANSCRIPT FOR RECORD ON APPEAL.

To the Clerk of the Above Entitled Court:

You will please prepare and certify transcript for use on appeal of above named G. Heileman Brewing Company to the United States Circuit Court of Appeals for the Ninth Circuit, from the order sustaining the demurrer to complaint and final decree dismissing the action made and entered on the 3rd day of April, 1911; said transcript to consist of the following records and files in the above entitled cause:

1. Bill of Complaint.
2. Demurrer to complaint.
3. Order sustaining demurrer entered March 15th, 1911.
4. Notice of election to stand on complaint.
5. Final decree dismissing action filed April 3rd, 1911.
6. Petition for appeal and allowance thereof filed May 20th, 1911.
7. Assignment of errors, filed May 20th, 1911.
8. Bond on appeal filed May 26th, 1911.

9. Citation on appeal and admission of service filed May 26th, 1911.

10. This Praecipe.

G. WARD KEMP,
Solicitor for Plaintiff and Appellant.

Endorsed: Praecipe for Transcript. Filed U. S. Circuit Court, Western District of Washington, May 29, 1911. Sam'l D. Bridges, Clerk, B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

G. HEILEMAN BREWING COMPANY,
Complainant and Appellant,
vs.
THE INDEPENDENT BREWING COMPANY,
Defendant and Appellee.
No. 1953.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington.—ss.

I, Sam'l D. Bridges, Clerk of the Circuit Court of the United States for the Western District of Washington, do hereby certify the foregoing 31 printed pages, numbered from 1 to 31 inclusive, to be a full, true and correct copy of the record and proceedings in the above and foregoing entitled cause as is called for by the praecipe of the Attorneys for the Appellant, as the same remain of record and on file in the

office of the Clerk of said Court, and that the same constitute the record on appeal from the order, judgment and decree of the Circuit Court of the United States for the Western District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit.

I further certify that I hereto attach and herewith transmit the Original Citation issued in this cause.

I further certify that the cost of preparing and certifying the foregoing transcript is the sum of $53.75, and that the said sum has been paid to me by G. Ward Kemp, Esquire, Attorney for Complainant and Appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, at Seattle, in said District, this 24th day of June, 1911.

(Seal)

SAM'L D. BRIDGES, Clerk.
By B. O. WRIGHT, Deputy.

No. 2002

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

G. Heileman Brewing Company,
Appellant,

vs.

Independent Brewing Company,
Appellee.

Brief on Behalf of Appellant.

G. WARD KEMP,
Solicitor for Appellant.

E. T. FENWICK, and
L. L. MORRILL,
Of Counsel.

J. D. MILANS & SONS, LAW PRINTERS 616 E STREET, N. W., WASHINGTON, D. C.

United States Circuit Court of Appeals.

FOR THE 9TH CIRCUIT.

G. Heileman Brewing Company,
Appellant,
vs.
Independent Brewing Company,
Appellee.

BRIEF ON BEHALF OF APPELLANT.

This cause is before this court on an appeal from a decree entered herein on the 3rd day of April, 1911, in the United States Circuit Court for the Western District of Washington, Northern Division, dismissing the Bill of Complaint of Complainant with prejudice and for costs against the Appellant herein.

The Bill of Complaint alleges the corporate existence of the Appellant and upon information and belief the corporate existing of the Appellee, the adoption by the appellant of the trade-mark sued upon eight years previous to the commencement of this action and acquiescense by others in such use. It further alleges the registration of the mark in the United States Patent Office on the 25th day of June, 1907, No. 63,492, and exhibits a certified copy of such registration. After a short description of the mark and label the Bill alleges the continued and uninterrupted use by the Appellant in interstate commerce between the state of residence of the Appellant, Wisconsin, and other states of the Union, and the expenditure of large sums of money for advertising and exploiting its said

mark, alleging it is now the owner of said mark and entitled to the exclusive use thereof. The Bill further charges that the defendant with full knowledge of the Appellant's rights and the reputation of Appellant's beer identified by said mark has unlawfully diverted to itself, the Appellee, the Appellant's profits and good will, charging further a flagrant imitation of Appellant's label and unfair competition, confusion and deception in selling Appellee's beer for Appellant's beer under and fostered by said label ending with the usual prayer for injunction, profits, damages and other relief. In other words the Bill of Complaint sets up in the usual and ordinary terms two causes of action, one for infringement of trade-mark and one for unfair competition in trade, both resulting from the same act of the defendant, the Appellee herein, and held by the courts unanimously as being joinable in the same action.

To this Bill of Complaint, duly served and filed, the defendant, the Appellee, interposed a demurrer. It is not positive from the examination of said demurrer whether it is general or special. Certainly the first three causes for demurrer are general. The fourth cause for demurrer would undoubtedly be special if it had properly pointed out the fraud against which such cause for demurrer is directed. The several causes of demurrer are as follows:

I.

> "That said bill does not state facts sufficient to constitute a cause of action in favor of the complainant."

There can be no question that this is a general statement of demurrer.

II.

> "That there appears no equity in the bill."

Again there can be no question that this is a general demurrer directed to the whole bill.

III.

> "That it appeareth by complainant's showing in said bill that it is not entitled to the relief prayed for nor to any other form of relief, against the defendant."

As this is directed to the prayer for relief, and as the prayer for relief in the bill is injunction, discovery, accounting and for damages, and as this is directed to the whole cause of action alleged it cannot be seen how this third cause can be construed other than general.

IV.

> "That it appeareth by said bill that complainant's claim of right to relief is based upon the fraud of complainant itself, and other fraud, and such bill should be dismissed."

This fourth cause alleges fraud but does not set up the specific fraud referred to nor does it point out in the Bill of Complaint where the allegation is found upon which the charge of fraud is predicted. It must be assumed, therefore, that the fourth cause is also a general demurrer although this question will be discussed somewhat hereinafter.

The order sustaining the demurrer entered in the court below on the 15th day of March, 1911, does not enumerate upon what ground the order is entered, nor is any opinion or finding entered in the case upon which to base a specification as to in what manner the decree is erroneous. The decree itself, entered as aforesaid on the 3rd day of April, 1911, is not more concise, simply dismissing the bill and sustaining the demurrer.

It is only by going to the brief and argument interposed by the Appellee that any light is thrown upon the question.

This brief submitted by the defendant at the prior hearing herein is, by the way, a most remarkable document and so

that it may not be lost to history is reproduced here in full, omitting the caption only, and is as follows:

"This demurrer raises two most important points in relation to the bill in equity submitted by the complainant, and we will treat them separately;

One being that the bill on its face shows that the complainant relies upon its own fraud for recovery, which, of itself, would defeat recovery in a court of equity.

The second being that the bill depends upon a conflict of two labels, one being owned and possessed by complainant, and the second being owned, possessed and used by the defendant; that defendant's label is an infringement of complainant's trade-mark.

Taking up the first proposition, it will doubtless be conceded that a complainant cannot come into a court of equity and demand injunctive relief for the purpose of perpetrating a fraud.

> Connell vs. Reed, 128 Mass., 477;
> Manhattan Medicine Co. vs. Wood, 108 U. S., 218 to 227 and cases cited.

> "Where a symbol or label claimed as a trade-mark is so constructed or worded as to make or contain a distinct assertion which is false, I think no property can be claimed under it; or, in other words, the right to the exclusive use of it cannot be maintained."

Complainant's pretended label, or something similar to it, is shown to have been trade-marked on June 25, 1907, No. 63,492 (see Exhibit "B" attached to bill in equity); but the label itself (Exhibit "A," bill in equity) recites on the bottom thereof the following:

> "Copyrighted, 1902, by G. Heileman Brewing Company."

It is needless to urge upon this court that no allegation is

made that this label is subject to copyright; nor is there any allegation that it was ever copyrighted; and complainant has been guilty of an offense against the laws of the United States of America, and against public morals, ever since the year 1902, by pretending to use a copyrighted label for which it has never even had a trade-mark, so far as the pleadings show, until June 25th, 1907.

The prayer of the bill in equity is that this defendant be enjoined from using an infringing trade-mark and label that would infringe upon this fraudulent and pretended copyrighted label shown as Exhibit "A."

Complainant can obtain no rights in a court of equity to have the fraud, which it has been perpetrating for the last nine years, continued.

The statutes of the United States cover this proposition.

The Act of March 3, 1881, Chap. 138, Sec. 8, being XXII Statutes at Large, p. 504, provides:

> "No action nor suit shall be maintained * * * in any case where the trade-mark * * * has been used with the design of deceiving the public," etc., etc.,

The Revised Statutes at Large, Sec. 4963, provides:

> "Every person who shall insert or impress such notice" (of copyright) "upon any * * * printed copy, engraving or photograph, or other article for which he has not obtained a copyright, shall be liable to a penalty of $100.00," etc., etc.

Sec. 21 of the law of Feb. 20, 1905, relating to trade-marked, and which is found in volume 10 of Federal Statutes Annotated, at page 415, provides as follows:

> "No action shall be maintained * * * in any case * * * when the mark (trade-mark) has been used with a design of deceiving the public."

We take it that this section of the Statute completely covers the case at bar, and complainant's bill in equity gives it no equitable right to relief, as it is depending solely upon a fraudulent label.

* * * * * * *

The United States Statutes go farther in regard to trademarks, and the Act of Feb. 20, 1905, Secs. 28 and 29, 10 Federal Statutes Annotated, p. 415, provides, that in order to claim a right to infringement of a trade-mark, the label or other article claimed as a trade-mark must contain the words "Registered in United States Patent Office," or words to that effect.

This complainant's label or trade-mark has no such distinction, nor anything like it, and no attempt seems to have been made to comply with the law after the trade-mark was registered in 1907, but an attempt was made to make the public believe that this label was claimed as a copyright in 1902.

Under the decisions above referred to this complainant is demurrable, because the label shows on its face that it did not contain the required words of Secs. 28 and 29 of the Act of Feb. 20th, 1905.

The court will remember that this action is based upon a claim to a trademark; that the label set forth as complainant's basis of relief recites on its face that it was copyrighted in 1902.

The claim to a trade-mark of a label is *void* if the label is published before it is registered as a trade-mark.

> Bump on Patents and Trade-marks, 2nd Ed., p. 502, and notes.

And the bill for relief must allege that the trade-mark was secured before the publication.

> *Ibid.*

Taking the bill in equity in this case on its face it appears that this label was published five years before it was registered as a trade-mark, and no allegation appears that it was trademarked before publication.

Recovery cannot be had.

Referring now to the second proposition, that there is no actual infringement because the labels are substantially and almost completely unlike, it will probably not be contended that the words upon the two labels conflict, the only word which appears upon both being the word "Lager," and it will not be contended that the word "Lager" can be either copyrighted or trade-marked by any one of the present generation.

It will be observed that the main portion of the defendant's label consists of words and printing, while the main portion of complainant's label consists of pictures.

The bill of complaint practically admits that these two pictures, taken as a whole, do not show a clear conflict.

The copy of the bill received by defendant is not paragraphed, nor are the lines numbered, but on page 7 it is stated that when the labels are attached to cylindrical bottles they are not visable in their entirety, but only in sections, and that certain sections of the label, exemplified by Exhibit "C," more nearly resemble corresponding sections of complainant's label, exemplified by Exhibit "A" in that case than when in some other position; in other words, the damage seems to depend upon how you hold your bottle of beer while you drink it; but for the purpose of this argument, such statement in the bill is admittedly true, and it is doubtful whether any person using these two labels could possibly believe that one infringed on the other. It would take careful study of the two and minute examination to find where the conflict is.

Taking the two labels, it will be noticed that in one there is a boiling kettle hanging on a support, with no one near the same; in the other, there seems to be a boiling kettle sitting out in a field, with three or four German figures surrounding the same, and a woman pouring liquor into the kettle.

This is the only thing on the left half of complainant's label that in any wise corresponds with the same half of defendant's label.

On the right half of complainant's label, and at the lower side thereof, there appear three barrels of "Old Style Lager" and some parties walking past the same; and in the center of

defendant's label at the bottom, appear three barrels of "Old German Lager," with some monks sitting at a table and drinking the same.

Near the three barrels in complainant's label, and to the rear thereof; apparently in a subterranean cellar or section of the same; appear two men upon a platform supported by wooden horses, coopering a barrel; and at the lower left-hand corner of defendant's label appears a somewhat similar scene, without the wooden horses to support the platform; the men working in different positions and out in an open field, not in a basement.

In no other place, so far as we have examined the label, is there any similarity. The colors are entirely different, the printing absolutely different, the arrangement of the figures entirely different, and it would be a strong stretch of imagination to believe that any person seeing these two labels on adjacent bottles of beer, would believe that either one pretended to be a copy of the other.

A division of the labels by vertical lines, each into three equal sections, will show that if these labels were on an upright cylinder no one section of either label would correspond *in any wise* with the other.

We submit that the bill is without equity on its face, because defendant's label in no wise infringes upon or conflicts with complainant's label.

Similarity between trade-marks must be such as to raise the presumption of a design to deceive the public.

McCartney vs. Garnhard, 45 Mo., 593; see note, 85 American St. Repts., p. 119;
Also, 47 American Decisions, pp. 284 to 299;
Also 96 U. S., p. 255, Co-operative Ed. Vol. 24, p. 828;
150 U. S., p. 467;
149 U. S., p. 573;
And many other cases, the citation of which seems superfluous.

It has been repeatedly decided that mere color is not subject to trade-mark.

Fleischman vs. Starkley, 25 Fed., 127;
Coats vs. Merritt Thread Co., 149 U. S., 562;

It has further been decided that the form of the package, or of the bottles, is not important.

Evans vs. Van Laer, 32 Fed., 153.

But while these decisions are in point, it is almost unnecessary to cite them in this case, for an examination of complainant's Exhibit "A" and complainant's Exhibit "C" will show to this court that that although there is an artistic idea, which might be said to be a general one, in regard to these two labels, they do not as a matter of fact conflict in any manner.

Two people in the same general line of business will naturally use what they consider to be effective advertising.

We venture to say that it would be difficult for the court, in examining the files of our daily papers, without the name of the advertising company before him, to determine whether any single one-page advertisement was that of Grote-Rankin & Co., the Standard Furniture Company or the Bon Marche; and it would only be by looking at the name of the advertiser that the court would immediately determine which advertisement was being read, but yet, upon a more careful examination, it would be found that perhaps some red letter, picture of a piece of furniture or other material, was the same in all the advertisements, and the general effect one to attract the attention of the public, and still there is no infringement nor pirating of rights.

Respectfully submitted,
R S. Jones,
Attorney for Defendant.

The argument presented by counsel for the defendant below was along the same line as that which appears in the brief and in the absence of any opinion or finding by the lower court it must be assumed that the court adopted the views of counsel

for defendant in sustaining the demurrer and that the brief herein reproduced may be substantially considered the opinion of the lower court.

It is apparent that the court below must have wholly disregarded the allegation of unfair competition in trade contained in the bill as this point is not touched upon in any manner in the brief or argument interposed on behalf of the defendant below. It must be assumed that counsel for the defendant did not and does not appreciate the fact that action for infringement of trade-mark and for unfair competition in trade are two separate and distinct causes of action, joinable, however, in one suit in equity.

It seems almost an insult to present law on this point to this court for the reason that the practice has been so well established by long years of unanimous adjudication that unfair competition and trade-mark infringement are separate causes but joinable, and as the point of unfair competition was not apparently attacked or considered in the court below, such right of joinders of action will not be considered specifically and at length in this brief.

It seems also from the brief submitted below by defendant that counsel for the defendant was not able to differentiate between trade-marks and copyrights. The fourth cause for demurrer that the claim for relief is based upon the fraud of complainant must be considered from the point of view set forth in defendant's brief which in the essence is that because there appears upon the label of complainant the legend "Copyright, 1902, by G. Heileman Brewing Company," it was a fraud to allege in the Bill of Complaint that trade-mark registration was secured in 1907; defendant's counsel arguing that the copyright law (old law) required copyright entry to be made before the label was published and that any claim to copyright since as early as 1902 where a trade-mark registration was secured in 1907 was a fraud.

The present cause of action is not upon the copyright entry. As a matter of fact copyright was secured by entry made in 1902 but this action was not based upon such copyright but is based upon trade-mark rights acquired by the use of the

label from 1902 to the beginning of this action, upon the registration of the trade-mark secured in 1907 and upon unfair competition in trade by the defendant selling its goods as and for the goods of complainant deceiving purchasers thereby.

The distinction between copyrights and trade-marks is too well known to require a great amount of law quoted to this court but the attention of the court is invited to Hopkins on trade-marks, Second Edition, Sec. 7, page 14, as follows:

> "While trade-marks to a degree partake of the nature of both patents and copyrights, and the three have many governing legal principles in common, there are wide differences separating each from the other. As stated by Mr. Justice Miller in Trade-mark Cases, "the ordinary trade-mark has no necessary relation to invention or discovery. The trade-mark recognized by the common law is generally the growth of a considerable period of use, rather than a sudden invention. It is often the result of accident rather than design, and when under the act of Congress it is sought to establish it by registration, neither originality, invention, discovery, science or art is in any way essential to the right conferred by that act. If we should endeavor to classify it under the head of writings of authors, the objections are equally strong. In this, as in regard to inventions, originality is required. And while the word writings may be liberally construed, as it has been, to include original designs for engravings, prints, etc., it is only such as are original, and are founded in the creative powers of the mind." And in the House of Lords, in 1882, Lord Blackburn said, "trade-marks have sometimes been likened to letters patent and sometimes to copyrights, from both of which they differ in many respects. And I think, to borrow a phrase used by Lord Ellenborough in Waring v. Cox, with reference to a different branch of the law, 'much confusion has arisen from similitudinary reasoning on the subject.' "

Also a part of Sec. 14 which relates to the same subject as follows:

> "It goes without saying that a trade-mark or trade name can only be acquired by adoption accompanied

with actual use." The inventor of a system of manufacturing garments, who has never engaged in their actual manufacture and sale, has no trade-mark right in a mark to be applied to such garments.

A mere casual use, interrupted, or for a brief period, will not suffice to establish a trade-mark right in the mark; there must be such a user, as to its length and publicity, as will show an intention to adopt the mark as a trade-mark for a specific article."

Also to that part of Sec. 17 quoting from Coddington on trade-marks which is as follows:

> "'The interference of courts of equity, instead of being founded upon the theory of protection to the owner of trade-marks, is now supported mainly to prevent fraud upon the public. If the use of any words, numerals or symbols is adopted for purpose of defrauding the public, the courts will interfere to protect the public from such fraudulent intent, even though the person asking the intervention of the court may not have the exclusive right to the use of these words, numerals or symbols. He added that this rule was fully supported by four cases, two English and two American, which he cited. Since that time, the recognition of the doctrine so expressed has grown steadily and certainly so that it now demands treatment as a specific branch of the law, separate, apart from, but including the narrower and strictly technical law of trade-marks.'"

In this respect Mr. Justice Clifford in McLean vs. Fleming, 96 U. S. 245, 24 Law Edition, 828, said:

> "'Nor is it necessary, in order to give a right to an injunction, that a specific trade-mark should be infringed; but it is sufficient that the court is satisfied that there was an attempt on the part of the respondent to palm off his goods as the goods of the complainant.'"

Copyright registration of labels is provided for by an entirely different statute than that which makes provision for trade-mark registration; the old copyright law being the act

of June 18th, 1874, 18 statutes at large, 78, Section 3, reading as follows:

> "That in the construction of this act the words 'engraving,' 'cut' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the Patent Office. And the Commissioner of Patents is hereby charged with the supervision and control of the entry or registry of such prints or labels, in conformity with the regulations provided by law as to copyright of prints, except that there shall be paid for recording the title of any print or label not a trade-mark, six dollars, which shall cover the expense of furnishing a copy of the record under the seal of the Commissioner of Patents, to the party entering the same."

In construing this law the Supreme Court of the United States in Higgins v. Keuffel, 140 U. S. 428, 35 Law Ed., 470, in an opinion by Mr. Justice Field said:

> "A trade-mark may sometimes, it is true, in form serve as a label, but it differs from a mere label in such cases in that it is not confined to a designation of the article to which it is attached, but by its words or design is a symbol or device which, affixed to a product of one's manufacture, distinguishes it from articles of the same general nature, manufactured or sold by others, thus securing to the producer the benefits of an increased sale by reason of any peculiar excellence he may have given to it. Amoskeag Mfg. Co., v. Trainer, 101 U. S., 51, 53 (25:993, 994). A mere label is not intended to accomplish any such purpose, but only to indicate the article contained in the bottle, package or box to which it is affixed. The label here is not claimed as a trade-mark. If the complainants have any rights to its words as a trademark, it is not in any manner involved in this case, as was stated by the court below.
>
> By assuming that the Constitution authorizes legisla-

tion for the protection of mere descriptive labels as properly the subjects of copyright, and that the Statute relating to copyright of books and other compositions in writing includes such labels, the proceedings taken to secure a copyright of the label in the present case were insufficient and ineffectual for that purpose.

The Revised Statutes of the United States secure to the author, inventor or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print or photograph, and to the executors, administrators or assigns of such person, the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same, upon complying with certain provisions. Sec. 4952.

One of those provisions is, that the person seeking a copyright shall, before publication, deliver at the office of the Librarian of Congress, or deposit in the mail addressed to such librarian, a printed copy of the book or other article for which he desires a copyright, and within ten days from the publication thereof deliver at the office of such librarian, or deposit in the mail addressed to him, two copies of such copyright book or other article. Sec. 4956.

They also provide that no person shall maintain an action for the infringement of his copyright unless he has given notice thereof by inserting in the several copies of every edition published, on the title page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving or photograph, by inscribing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words: "Entered according to Act of Congress, in the year ——, by A. B., in the Office of the Librarian of Congress at Washington." Sec. 4962.

The Act of June 18th, 1874 (18 Stat. chap. 301, p. 78), changes the previous law in some respects. It allows, in place of the statement of entry in the office of the

> Librarian, the simple use of the word "copyright," with the addition of the year it was entered and the name of the party by whom it was taken out. It also declares that the words "engraving," "cut," and "print" shall be applied only to pictorial illustrations or works connected with the fine arts; and also that no prints or labels designed to be used for any other articles of manufacture shall be entered under the Copyright Law, but may be registered in the Patent Office. And the Commissioner of Patents is charged with the supervision and control of the entry or registry of such prints or labels in conformity with the regulations provided by law as to copyright of prints."

The above decision shows what must be done to protect labels entered for copyright protection, Sec. 3, above quoted. Long prior to the decision of Higging vs. Kenffel, Judge Blatchford in Marsh vs. Warren, 14 Blatchf. 263; had held that this section was purely a copyright act and that under the general copyright regulation of Congress no person could claim protection for a label so registered unless "before publication" he had deposited a printed copy of the title of the article in respect of which the copyright was claimed, in the Patent Office. The rules of the U. S. Patent Office in force in 1902 relative to the registration of labels is as follows:

> "The word 'label,' as used in this act, so far as it relates to registration in the Patent Office, is defined as an artistic and intellectual production impressed or stamped directly upon the article of manufacture, or upon a slip or piece of paper or other material, to be attached in any manner to manufactured articles, or to bottles, boxes and packages containing them, to indicate the article of manufacture."

The word "label" as used in the above quoted section from the Rules of Practice is the common designation employed in the Patent Office for copyright registration. Copyright registration in the Patent Office is divided under two heads "print

registration'' and ''label registration,'' only the latter of which is interesting in the present case as there is no hint of any print registration but only that of label registration.

It is believed that more than sufficient law has been quoted relative to the distinction between copyright registration and trade-mark registration to show the fallacy of the argument presented by defendant below confusing the two. Suffice it to say that the present cause of action has made no claim for infringement of copyright. It is, of course, apparent that if the Federal Government permitted twenty different kinds of registration, all of which could be applied to a single label, an injured party would not be obliged to join in one action charges for infringement of all of said registrations but would be permitted to choose such infringements and damaging acts as are applicable to the particular case. It is believed that this disposes of the citations both from Connell vs. Reed, 128 Mass., 477 and from Manhattan Medicine Co. vs. Wood, 108 U. S., 218, which were directed to the false and misleading statement appearing upon the label. In the present case even if the statement upon the label of copyright entry in 1902 is false and misleading it does not so appear upon the face of the bill or from the label which forms an exhibit in said bill and the falsity of such statement is subject for proof and not for demurrer.

That trade-mark registration was actually made in 1907 can hardly be doubted from the fact that a certified copy of such registration forms a part of the Bill of Complaint. It is believed that this also disposes of the quotation from Section 8, Chap. 138, Act 2, Statutes at Large.

As to the quotation from Sec. 21, in the Law of Feb. 20th, 1905, prohibiting the maintaining of any action if the trade-mark is used for deceiving the public it is seen that counsel for defendant stops a few words short of the real purport of said rule which reads:

> ''with the design of deceiving the public in the purchase of merchandise.''

The deception of the public which it is alleged in the brief is incident upon the use of appellant's label is the deception which it is claimed was practiced by claiming copyright registration in 1902 and trade-mark registration in 1907.

It is undeniably true that Section 28 of the Act of Congress of Feb. 20th, 1905, does make it the duty of the owner of a trade-mark to affix thereon the words "Registered in U. S. Patent Office" or abbreviated thus, "Reg. U. S. Pat. Off." but attaches no penalty to such requirement except that in suit for infringement a party failing to give notice of registration shall not recover damages except on proof that the defendant was duly notified of infringement and continued the use after such notice. In the present case the Bill of Complaint duly alleges notice to the defendant and the continuity of infringement after such notice and while such notice is not given in the manner prescribed in Section 28 it was given as alleged in the Bill of Complaint and as such can be proven in due course.

From the remarks of the judge from the bench in the court below during the hearing it is believed that no great amount of consideration was given to the subject hereinbefore discussed, to wit: The fraud of complainant as set up in the demurrer of the defendant. How much weight such allegation may have had on the court is, of course, not known and does not appear in any finding or opinion but it seems that the court decided the point raised by the demurrer more upon the ground that the label of the defendant does not in his opinion infringe the label of the complainant than upon any other ground; this being the second proposition raised by the brief of defendant's counsel.

It is also to be assumed that the court below adopted as its standard in determining dissimilarity of the labels the position taken by defendant's counsel. Defendant's counsel admits that "there is an artistic idea, which might be said to be a general one, in regard to these two labels" and then proceeds to differentiate between the two labels, pointing out feature by feature the dissimilarity of the labels. It is assumed that this

differentiation impressed the court below and that the decision of the court was due to such ability on the part of defendant's counsel to distinguish between the two labels.

Upon this point all of the Federal courts have been particularly unanimous, following McLean vs. Fleming, 96 U. S. 245, which is considered the leading case upon this point. In this case the court speaks by Mr. Justice Clifford, saying:

> "Much must depend, in every case, upon the appearance and special characteristics of the entire device; but it is safe to declare, as a general rule, that exact similitude is not required to constitute an infringement or to entitle the complaining party to protection. If the form, marks, contents, words, or the special arrangement of the same, or the general appearance of the alleged infringer's device, is such as would be likely to mislead one in the ordinary course of purchasing the goods, and induce him to suppose that he was purchasing the genuine article, then the similitude is such as entitles the injured party to equitable protection, if he takes seasonable measures to assert his rights, and to prevent their continued invasion."

> "Positive proof of fraudulent intent is not required where the proof of infringement is clear, as the liability of the infringer arises from the fact that he is enabled, through the unwarranted use of the trade-mark, to sell a simulated article as and for the one which is genuine."

> "Colorable imitation, which requires careful inspection to distinguish the spurious trade-mark from the genuine, is sufficient to maintain the issue; but a court of equity will not interfere, when ordinary attention by the purchaser of the article would enable him at once to discriminate the one from the other. Where the similarity is sufficient to convey a false impression to the public mind, and is of a character to mislead and deceive the ordinary purchaser in the exercise of ordinary care and caution in such matters, it is sufficient to give the injured party a right to redress, if he has been guilty of no laches."

"Witnesses in great numbers were called by the complainant, who testified that the Exhibits L and K of the respondent were calculated to deceive purchasers, and the reasons given by them in support of the conclusion are both persuasive and convincing. Difference between those exhibits and Exhibits F and H of the complainant undoubtedly exist; and still it is manifest that the general appearance of the package in the respects mentioned, and others which might be suggested, is well calculated to mislead and deceive the unwary and all others who purchase the article without opening the box and examining the label."

"Two trade-marks are substantially the same in legal contemplation, if the resemblance is such as to deceive an ordinary purchaser giving such attention to the same as such a purchaser usually gives, and to cause him to purchase the one supposing it to be the other."

The question of similarity or dissimilarity is well treated in the opinion of Judge Lacombe, at circuit for the Southern District of New York in Labance & Grosjean Mfg. Co., vs. National Enameling & Stamping Co., 109 Fed. Rep. 317 (318) as follows:

"The other branch of motion, however, is concerned with a familiar field of litigation. The contrasted labels (Schedules E, F and G) reiterate an oft-told story. First we have the original label of defendant and its predecessors, printed in black ink on grayish blue paper, lozenge-shaped, 1⅞ inches on the side, and which had been used continuously for 26 years, long before complainant began to manufacture ware of this kind. Next appears the complainant's rectangular label, printed in dark blue on light blue paper, 4 6-10 by 2½ inches, with a device indicating trade designation in the upper half. This label was not introduced until 1897. Then in 1900, defendant substitutes for its old label a new rectangular one, 4 7-10 by 2 6-10 inches, printed in dark blue on light blue paper, with its old lozenge-shaped trade-mark in the upper half. It is difficult to understand how any

intelligent and unprejudiced mind can contemplate these contrasted exhibits, and reach any other conclusion than that the change was made with the intention of suggesting complainant's label to the retail purchaser. No amount of affidavits made by interested parties would be persuasive to the contrary. No necessity for any change at all is suggested, and, change being once decided on, it was so easy to make a change which would preserve the old lozenge, and still tend to differentiate between complainant's and defendant's goods, that a contrary course must be assumed to be designed to accomplish its natural result. It is no doubt true that no one can have a trade-mark monopoly in color of paper, or in shape of label, or in color of ink, or in one or another detail; but a general collocation of such details will be protected."

In Eagle White Lead Co. vs. Pflugh, 180 Fed. Rep. 579 (583) we find in an opinion by Judge Rellstab, at Circuit for the District of New Jersey the following:

"The question of infringement is to be determined by this test of dominancy. The dissimilarity in size, form and color of the label and the place where applied are not conclusive. If the competing label contains the trade-mark of another, and confusion or deception is likely to result, infringement takes place, regardless of the fact that the accessories are dissimilar. Duplication or exact imitation is not necessary; nor is it necessary that the infringing label should suggest an effort to imitate. The appropriation of a symbol may be without knowledge that another has obtained the right to its exclusive use. Bass et al. vs. Feigenspan (C. C.) 96 Fed. 206; Morgan Sons Co. vs. Ward., 152 Fed. 690, 81 C. C. A., 616, 12 L. R. A. (N. S.) 729; McLean vs. Fleming, 96 U. S., 245, 24 L. Ed. 828; Hutchinson, Pierce & Co. vs. Loewy, 163 Fed. 42, 90 C. C. A. 1; Gilka vs. Mihalovitch (C. C.) 50 Fed. 427; Hygeia Distilled Water Co. vs. Consolidated Ice Co. (C. C.), 144 Fed. 139, affirmed 151 Fed. 10, 80 C. C. A. 506. The method and accompaniments of its use may negative the idea of imitation and yet infringement exist.

> Having this test and the rules in applying it in mind, do the words "Gold Eagle," used in connection with a representation of that bird, infringe the complainant's trade-mark? The eagle is its trade-mark, not the size and color of the letters constituting the word, or the posture of the representation; nor the form, color, or size of the label upon which the word or picture appears; nor the color of the imprint; nor the particular place on the goods where the label or brand is applied. All of the latter are accessories. They furnish but the environments. They may be changed at will."

The case of National Water Co. vs. O'Connell et al., 159 Fed. Rep. 1001 is especially interesting, not so much on account of the opinion of His Honor, Judge McPherson, at Circuit for the Eastern District of Pennsylvania, as on account of the showing made of the labels of both parties which were held by the court to be similar and the original labels infringed. These labels are reproduced in volume 159 of the Federal Reporter and the attention of the Court is especially invited to the volume itself wherein a reproduction of these labels occurs. The reproduction of the labels as they appear in the volume are perhaps more nearly similar than the actual labels as in the reproduction the exact shades of yellow and red have been employed for both labels whereas the exact shades were not employed in the original labels.

The labels of the National Water Co., are again the subject of litigation as reported in National Water Co. vs. Hertz, 177 Fed. Rep. 607, Circuit Judge Lanning presiding at Circuit in New Jersey. The same label was litigated as appears in National Water Co. vs. O'Connell *supra;* the label of Hertz being even less similar but not reproduced. This case is referred to from the fact that it especially cites with approval the foregoing case of National Water Co. vs. O'Connell.

In Enoch Morgan's Sons' Company vs. Hunkele, 4493 Fed.

Cases, we find in an opinion by Judge Nixon, at the Circuit for New Jersey the following:

> "The demurrer admits all the allegations of the bill of Complaint. The only question, therefore, before the court is whether a sufficient cause of action appears upon the face of the bill."
>
> "Stripped of all verbiage, the charge is that the defendant has fraudulently simulated the manufacture of the complainant, and that he has successfully deceived the public by inducing it to purchase the simulated for the genuine article. It is not a question whether the defendant has in all respects imitated the trademark of the complainant, but whether he has so imitated it that the purchaser has been imposed upon."
>
> The defendant insists that there are such differences in his mode of using and combining the colors on the wrapper that no careful purchaser need be deceived if he exercises ordinary care and prudence. This may be true, and, in the absence of fraud, and upon the merits, the court may not be willing to hold that an infringement has been shown. But the fraud has been confessed by the demurrer, and such confession entitles the complainant to an injunction."

Also in Old Lexington Club Distillery Company vs. Kentucky Distilleries and Warehouse Company, in an opinion by Judge Cross, at the Circuit for New Jersey, reported in 1909, Commissioner of Patents Decisions, page 268, we find a discussion of a demurrer interposed to a bill for the reason that the alleged trade-mark is descriptive. The court in that case, as appears by an extract from the opinion of Judge Cross, holds that such matter is properly provable and dismissed the demurrer. The part of the discussion which is applicable to the present cause is as follows:

> "The invalidity of the mark in question is not upon its face obvious; the most that can be said is, that it is doubtful. Turning briefly to the causes of demurrer, it may be said as to the first, that an objection that a trade-

> mark is invalid because, consisting of a geographical name cannot be considered on demurrer. (Jewish Colonization Association et al. vs. Solomon and Germanski, 125 Fed., 994.) And particularly is this so where, as in this case, it is alleged in the bill and admitted by the demurrer, that the words "Old Lexington Club," have been recognized for a long period, by the trade and the purchasing public as an arbitrary mark, identifying the origin and ownership of the goods upon which they appear and that the complainant is entitled to the sole use thereof. The second ground of demurrer is likewise a proposition which cannot in the absence of evidence and in view of the allegations of the bill, be adjudicated in favor of the demurrant. The mark, may, or may not be descriptive in fact, but the bill alleges that it is not, and the demurrer admits that it is not.
>
> Any intimation as to the ultimate merits of this controversy, has been carefully avoided. The only attempt has been to show that its merits can only be safely adjudicated here, as they were in the court of appeals, after all available light has been thrown upon the matter, by evidence."

Especially applicable to counsel's attempt to differentiate between the labels point by point is the discussion of Judge Thomas, at the Circuit for the Southern District of New York in Cantrell & Cochrane vs. Butler, 124 Fed. Rep. 290, in which the judge disposes of counsel's argument as follows:

> "Conformity of one label to another sufficiently to attract and deceive is not excused by ability to analyze the offending label and point out differences, which if known and recognized would avoid confusion. The ensemble does the mischief; the usual purchaser neither abstracts nor analyzes for the purpose of differentiation and judgment."

It is to be borne in mind that the purchaser seldom has both labels before him, so as to be in a position to make comparisons. He must rely almost solely upon his memory as to how the genuine label appears, so that it would be very easy for an

unscrupulous dealer to palm off on him the goods of the appellee bearing the label complained of, upon the same.

As fixing also the assumption that the judge in the court below was impressed by the specification of dissimilarity the court in Shaw Stocking Co. vs. Mack, 12 Fed. Rep. 707 (713) in an approved quotation by Judge Coxe eliminates the expert as follows:

> "It is not necessary that the resemblance produced should be such as would mislead an expert, nor such as would not be easily detected if the original and the spurious were seen together. It is enough that such similitude exists as would lead an ordinary purchaser to suppose that he was buying the genuine article and not an imitation."

The attention of the court is particularly invited to this case for the reason that the labels in controversy are therein reproduced on pages 708 and 709. If such labels as therein appear are not sufficiently dissimilar so that a demurrer is sustained most certainly the dissimilarity of the labels in controversy in this cause are not such that they should be disposed of on demurrer.

In Bickmore Gall Cure Co. vs. Karns et al., 134 Fed. Rep. 833, the Court of Appeals for the Third Circuit speaks by Judge Dallas picked out as especially applicable a part of the opinion in McLean vs. Fleming *supra*. as follows:

> "The means devised to that end were well calculated to mislead, and it was not essential that any particular person should have been actually misled."

While the part of the opinion of McLean vs. Fleming just referred to is not particularly applicable to the present cause at the present stage; being rather a conclusion to be reached after the taking of testimony, it, nevertheless, is applicable to the fact that the court below claimed it was not deceived by the two labels. Such comparison was, of course, made by the court below with the two labels side by side which has been repeatedly held is not the test for trade-mark infringement.

If the similarity is such that a person seeing the genuine mark today would be deceived upon seeing the infringing mark next week the similarity is sufficient to sustain a charge for infringement. As showing again what the courts have held sufficiently similar to warrant dismissing a demurrer we cite Scheuer vs. Muller et al., 74 Fed. Rep. 225 wherein again the labels are reproduced. This is from the Court of Appeals of the Second Circuit and was decided *per curiam*.

The law relative to confusion and deception between trade-marks is quite similar to that relative to design patents. For this reason we quote from New York Belting and Packing Co. vs. New Jersey Car Spring and Rubber Co., 137 U. S. 445, 34 Law Ed. 741, from the opinion of Mr. Justice Bradley, as follows:

> "We think that the demurrer should have been overruled, and that the defendants should have been put to answer the bill. Whether or not the design is new is a question of fact, which, whatever our impressions may be, we do not think it proper to determine by taking judicial notice of the various designs which may have come under our observation. It is a question which may and should be raised by answer and settled by proper proofs."

The Court of Appeals of the District of Columbia, which, by the way, handles more trade-mark litigation than all the other courts of appeals and possibly all other Federal courts in the United States combined, in Walter Baker & Co. vs. Harrison, 138 O. G. 770 (not yet reported in App. D. C.) on a demurrer found as a matter of law that the mark of Walter Baker & Co., for cocoa was so nearly simulated by the mark of Harrison trading as Aragan Coffee Co. for coffee as would be likely to cause confusion.

Counsel in this cause was also counsel in that and it is possible, therefore, to submit for the inspection of the Court the original labels which were considered by the Court of Appeals of the District of Columbia in said action; the labels being as follows:

When the dissimilarity of these two labels is considered and it is further considered that they are for different products, one being for coffee and the other for cocoa, and that it was nevertheless held as a matter of law by the Court of Appeals of the District of Columbia on demurrer that such degree of similarity existed it would be difficult to understand how a court of subordinate jurisdiction in the present case could find, as was found, that labels for the same goods, to wit: for beer, as closely allied in general effect and general impression as the labels of the parties herein are not similar and would not be liable to cause confusion.

It is believed that the cases above cited and quoted from, which have simply been selected almost at random, from many hundreds of reported cases along the same line will be amply sufficient to combat the assumption that the labels are not sufficiently similar to cause confusion and that a demurrer to that point should be sustained.

Nevertheless if this court should find that the court below in the exercises of sound discretion had not erred in holding that the labels were so dissimilar as not to be likely to cause confusion there is yet the point to be considered that this action is not confined wholly to a charge of infringement of the trade-mark but also includes a charge of unfair competition in trade which is a cause of action wholly different and distinct from that of infringement of trade-marks but which is the result of the same act by the defendant and is predicated upon the same label of the complainant. As bearing on the question of unfair competition in trade, the attention of the Court is respectfully invited to the following cases:

> "A manufacturer may put forth his goods in a dress, in no element of which—size, shape, color, lettering, word or symbol—has he an exclusive right of use; and yet, if the ensemble has come to be a public guaranty of origin and quality, he may secure protection against unfair trade of a preying competitor. (For cases in point, see Cent. Dig., vol. 46, Trade Marks and Trade Names, Secs. 21, 72. Unfair competition, see notes to


FRESH
QUAKER
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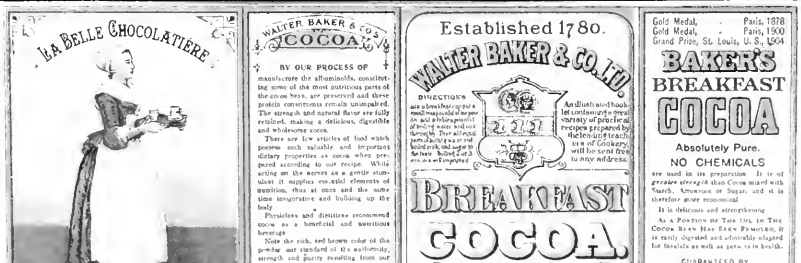
LA BELLE CHOCOLATIÈRE
WALTER BAKER & CO.'S
COCOA
BY OUR PROCESS OF
Established 1780.
WALTER BAKER & CO. LTD.
DIRECTIONS
BREAKFAST
COCOA
Gold Medal, Paris, 1878
Gold Medal, Paris, 1900
Grand Prize, St. Louis, U.S., 1904
BAKER'S
BREAKFAST
COCOA
Absolutely Pure.
NO CHEMICALS

Schener v. Muller, 20 C. C. A., 165; Lare v. Harper & Bros., 30 C. C. A., 376.) Enoch Morgan & Sons Co. v. Ward, 152 F., 690; 81 C. C. A., 616."

"In order to entitle complainant to relief in a suit for unlawful competition, it is not necessary that the public should be actually deceived; it being sufficient that the infringement had a tendency to deceive. (For cases in point, see Cent. Dig., vol. 46, Trade Marks and Trade Names, Sec. 86.) O'Connell et al. v. National Water Co., 161 F., 545."

In the case of Kenffel & Esser Co. v. H. S. Crocker Co., 118 F., 187, 190, the Court said:

"Where a manufacturer has been in business for many years and has established a high reputation for its goods, the law requires another who enters such business as a competitor to use such method of wrapping, labeling and cataloguing his goods as not to lead an intending purchaser of ordinary intelligence, using ordinary care, into the mistaken belief that when purchasing such goods he is purchasing the goods of the older manufacturer.

"The general rule is that anything done by a rival in the same business by imitation or otherwise designed or calculated to mislead the public in the belief that in buying the product offered by him for sale they were buying the product of another's manufacture would be in fraud of that other's rights and would afford just grounds for equitable relief. Hahenstein v. Perelstein, 37 Pa. Super. Ct., 540.

"An injunction should be granted if the defendants adopt their brand for the purpose of selling their goods as and for the goods of the complainant, or for the purpose of enabling others to do so, and the complainant has been injured, or is likely to be injured, thereby. In such case it will not be sufficient for the defendants to show that no deception is in fact practiced on those with whom they deal personally, but an injunction will be granted if consumers to whom the goods are intended to be resold are or may be deceived. The South-

ern White Lead Co. v. Carey et al., 25 F., 125; 33 O. G., 624; 1885 C. D., 462.

The bill of complaint makes allegations of unfair competition in trade as outlined in these decisions, and it is respectfully submitted that appellant should have been given an opportunity to prove said allegations in the usual way.

No argument was made and nothing said in the brief of defendant below relative to an insufficiency of statement or any short-coming of the bill on the charge of unfair competition in trade so that it is assumed that this phase of the bill has not and will not be attacked.

As the demurrer except the fourth paragraph which has been considered is a general one it is governed by the decisions of the courts relative to general demurrers, which hold that where a bill states more than one cause of action and any one cause of action is well pleaded then a general demurrer must be dismissed and the whole bill put upon its merits. A leading case upon this point is Stewart vs. Masterson, 131 U. S, 151, 33 Law Ed. 114 in which the opinion is by the late Eminent Justice Blatchford in part as follows:

> "The demurrer of Masterson purports to be a demurrer to the amended bill, and to the original bill as amended by the amended bill. It demurs thereto and to the jurisdiction of the court sitting in equity, and assigns several grounds of demurrer: (1) that the amended bill sets up substantially matters against which the court sustained the demurrer to the original bill, in that it appeared by the original bill, and cause No. 10 in equity therein referred to and stated as a part of Stewart's title, and the exhibits, order and decree in cause No. 10, that Stewart's pretended title to the lands sued for is based on the so-called McMullen grant, which the Supreme Court of Texas, in the case of McMullen vs. Hodge, 5 Tex. 34, and in Howard vs. McKenzie, 54 Tex. 171, declared to be vacant public domain; and the decision in McMullen vs. Hodge was rendered long before Stewart purchased, and McMullen, against whom it was rendered, is a remote vendor of

Stewart, and Stewart's claim is under him; and Stewart has not, by the amended bill, set up any other claim than the void one defectively set up in the original bill; and the amended bill does not contain proper allegations to entitle him to assert a claim for the value of improvements; (2) that there is a want of equity in the bills; (3) that Tait has no interest in the matters concerning which the decree is sought against Masterson, and no relief is asked against Tait, and no facts are alleged which would entitle Stewart to maintain this suit against Masterson and Tait, and there is a misjoinder of parties defendant; (4) that Stewart has a full, complete and adequate remedy at law.

* * * * * * *

It is assigned as error by Stewart that nowhere in the original bill or in the amended bill it is admitted that the McMullen title, which Stewart is litigating in this case, is the identical McMullen title which has been at various times litigated in the Courts of Texas; that the court below had no authority to take judicial notice of the identity of the grant in litigation with another grant referred to it in the state reports, when this identity was not admitted in the bill demurred to; and that that court could derive knowledge of such identity only from evidence properly offered and admitted, after due allegations in a plea or answer.

* * * * * * *

In addition to this, as there is matter properly pleaded in the amended bill, and properly ground for equitable relief, which requires an answer or a plea, and as the demurrer is to the whole bill, it ought to have been overruled. The case, as stated, shows there is no plain, adequate and complete remedy at law."

In Pacific R. R. of Mo. vs. Mo. Pacific R. Co., 111 U. S. 505, 28 Law Ed. 498 again in an opinion by Mr. Justice Blachford we find:

"The demurrers in this case are to the whole bill. If any part of the bill is good the demurrers fail. The charges of fraud in the bill, which are admitted by the

demurrers for present purposes, are sufficient to warrant the discovery and relief based on such charges, leaving for consideration only the questions of laches and of jurisdiction."

The Circuit courts have spoken many times upon this point as for instance in Merriam vs. Holloway, 43 Fed. Rep. 450, in the opinion by Mr. Justice Miller, sitting at circuit, as follows:

"The parties demur to the whole bill, and of course, if there is any one thing in the bill that is good—that is to say, if the bill taken altogether entitles the complainant to some kind of relief—the demurrer should be overruled. If a party in chancery or in a law case wants to demur to a particular part of a bill or declaration, he should not frame his demurrer as is done in this instance, so as to call the whole bill in question.

* * * * * * *

It may be necessary to ascertain, by taking proof, whether the use of the device in question in fact operates to deceive people, by leading them to suppose that the Webster's Dictionary sold by the defendants is printed and put on the market by complainants, and whether the adoption of the device in question by the defendants was intended to have that effect.

* * * * * * *

There is some hesitation among my brethren and myself, as above indicated, whether, taking the bill as a whole, and considering all of its averments, a general demurrer ought to be sustained.

* * * * * * *

Now, taking all of these allegations together, there may be some evidence of a fraudulent intent on defendants' part to get the benefit of the reputation of the edition of Webster's Dictionary which the complainants are publishing, and it may possibly be that, in consequence of the facts averred ,the public are deceived, and that the complainants are damaged to some extent. We

think, therefore, that this is one of those cases where, as the facts are stated in the complaint, the interests of justice would be best subserved by requiring the defendants to answer, so that there may be a full and fair investigation of the law and facts upon a final hearing.

* * * * * * *

The demurrer in this case, as we understand it, is not to special portions of the bill or particular allegations, but goes to the whole bill, and asserts that it contains no averments warranting equitable relief of any sort. We are unable, at this time, to fully assent to that view; but, at the same time, we do not wish to be understood as declaring definitely that the complainant is entitled to equitable relief."

In Putnam Nail Co. vs. Bennett, 43 Fed. Rep. 800, in an opinion by Judge Bradley we find:

"There is here a substantial fact stated—that the public and customers have been, by the alleged conduct of the defendants, deceived and misled into buying the defendants' nails for the complainant's. That averment is amplified in paragraph 4 of the bill. Now a trade-mark, clearly such, is in itself evidence, when wrongfully used by a third party, of an illegal act. It is of itself evidence that the party intended to defraud, and to palm off his goods as another's. Whether this is in itself a good trade-mark or not, it is a style of goods adopted by the complainants which the defendants have imitated for the purpose of deceiving, and have deceived the public thereby, and induced them to buy their goods as the goods of the complainants. This is fraud. We think the case should not be decided on this demurrer, but that the demurrer should be overruled, and the defendants have the usual time to answer. The allegations that the complainant's peculiar style of goods is a trade-mark be regarded as a matter of inducement to the charge of fraud. The latter is the substantial charge, which we think the defendants should be required to answer."

The Court of Appeals of the Third Circuit in Caldwell vs. Powell, 73 Fed. Rep. 488, uses the following language:

> "To this bill the defendant has interposed a general demurrer; and, for causes of demurrer, the want of invention and of novelty in the conception and production of the design where assigned. On the argument of the cause in the court below, the demurrer was sustained, and the bill dismissed. From that decree this appeal is taken.
>
> It is a general principle of equity pleading that, as a demurrer proceeds upon the ground that, admitting the facts stated in the bill to be true, the complainant is not entitled to the relief he seeks, all matters of fact which are stated in the bill are admitted by the demurrer, and cannot be disputed in arguing the question whether the defense thereby made be good or not, and such admission extends to the whole manner and form in which it is here stated; or, to state the principle more concisely, every charge in the bill, well pleaded, is absolutely admitted by the demurrer. Treating the issue raised by the bill and demurrer simply as one of pleading, it would be difficult indeed to find the slightest ground for the justification of the demurrer. The bill is full, complete and orderly in its statements of facts upon which the prayer for relief is based. It is not necessary to repeat again the averments and allegations which have been already quoted at some length. The effect of the demurrer is to admit their truth. If so, stronger reasons for equitable relief could hardly be advanced."

The attention of the court is especially invited to Holeproof Hosiery Co. vs. Richmond Hosiery Mills, 167 Fed. Rep. 381 from an opinion of Judge Newman in which we find:

> "I do not think it is necessary to decide this at the present stage of the case. It is sufficient to say that the complainant makes a case entitling it to relief, and how

large that relief should be or to what extent it should be restricted may well be determined when a final decree shall be entered in the case.

I was much impressed with the argument as to the prayer for injunction against the use of the word "Guaranteed." This is a word of such common use, and in all lines of trade, that of itself it would hardly seem the subject of appropriation by a manufacturer; but there may be force in the suggestion that, considering the relation in which it is used with other words, and the fact that the method of guaranteeing for a definite period the wearing qualities of the hosiery, using the "Guarantee coupons" to render the guaranty effective, so that the complainant's hosiery has come to be known as "Guaranteed Hosiery," the complainant has peculiar rights even to the use of this word. But it seems to me, as stated, that all this can very well be settled on final hearing and in the final decree, and that, as the complainant clearly makes a case by his bill entitling him to some relief, the demurrer should be overruled."

The court is also requested to especially examine this case in the report as it reproduces the labels of the parties which is applicable to the point previously considered herein of the similarity of the labels under discussion.

"The other ground of demurrer relied upon, which seems to be worthy of notice, is that the trade-marks and labels are themselves of such a nature, geographical and otherwise, that they are not the subject of rights to their exclusive use in this business. Whatever there may be to this question should apparently be raised as a matter of defense to the bill, and not by demurrer. Therefore the demurrer should, according to these views, be overruled, and the defendants be required to answer over." (Jewish Colonization Ass'n vs. Solomon & Germanski.) 125 Fed. Rep. 994.

In this circuit from the District of Oregon, in an opinion by Judge Wolverton we find Standard Varnish Works vs. Fisher,

Thorsen & Co., 153 Fed. Rep. 928, exactly in line with the previous quotations and citations. Judge Wolverton, however, does not use any particular sentence or paragraph which is particularly applicable to this case; the whole case being, however, exactly in point as is also another case from this circuit and also from the Court of Oregon, Pacific Live-Stock Co. vs. Hanley et al., 98 Fed. Rep., 327.

In the present case the Court below did not allow appeal from the interlocutory decree denying injunction which is specifically made appealable and required appellant to elect whether to amend its bill or stand thereon and subject itself to decree of dismissal. The complainant having chosen the latter alternative and stood upon its bill it is believed that appeal now having been taken in due course the defendant should be treated in like manner. In other words, it is believed that the demurrer which admits the allegations of the bill should be construed against the defendant and the court should order a decree entered in favor of the complainant.

The Supreme Court of the United States has so held in Dillon vs. Barnard, 88 U. S. 430, 22 Law Ed. 673, as follows:

> "A demurrer only admits facts well pleaded; it does not admit matters of inference and argument however clearly stated; it does not admit, for example, the accuracy of an alleged construction of an instrument, when the instrument itself is set forth in the bill, or a copy is annexed, against a construction required by its terms; nor the correctness of the ascription of a purpose to the parties when not justified by the language used. The several averments of the plaintiff in the bill as to his understanding of his rights, and of the liabilities and duties of others under the contract, can, therefore, exert no influence upon the mind of the court in the disposition of the demurrer. This is not the case of a bill to set aside or reform the contract as not expressing the actual intention of the parties. It is a case where the contention arises solely upon the meaning of the indenture in its bearing upon the contract, and that must be ascertained by applying to its language the ordinary rules of interpretation."

In other words, if this court finds that the complainant's cause of action is well pleaded it should in accordance with the decisions find that the defendant is estopped from now denying the allegations in the bill having once admitted the same.

The last paragraph of defendant's brief below is especially interesting as it shows that defendant's counsel is not only not able to distinguish between trade-marks and copyrights but it is not able to distinguish between trade-marks and mere advertisements. Advertisements are in a class as far remote from trade-marks as trade-marks are from bankruptcy, and it is believed that the weakness of this supposed argument will be so apparent upon its face as not to require any consideration or argument.

RESUME.

The contentions of appellant on this appeal are therefore:

1. That the demurrer is bad as far as it may be considered a special demurrer in that it does not point out the special fraud which it alleges the complainant has been guilty of.

2. That considered as a general demurrer it can prevail only if the court finds that there is no scintilla of relief which could possibly be afforded complainant under the pleading.

3. That no attack has been made upon the allegation of unfair competition in trade, and that such unfair competition is properly pleaded and relief should be granted under that head, even if the allegation of a trade-mark infringement is not sustained.

4. That the Court erred in holding as a matter of law that the two labels were so dissimilar as to relieve defendant's label from any charge of infringement, such assignment of error being the subject of numerous decisions hereinbefore cited.

5. That defendant's contention relative to the copyright law applying to trade-marks and the trade-mark law applying to copyrights is wholly fallacious and based upon a lack of understanding of the Statutes relative to these two subjects.

6. That this court should reverse the court below and remand the cause with directions to enter a decree in favor of complainant and against the defendant in accordance with the prayer of the bill and direct a reference to a Master for accounting and discovery.

Respectfully submitted,

G. Ward Kemp,
Solicitor for Appellant.

E. T. Fenwick, and
L. L. Morrill,
Of Counsel.

NO. 1953 2002

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

G. HEILEMAN BREWING COMPANY,

Appellant,

vs.

INDEPENDENT BREWING COMPANY,

Appellee.

NO. 1953 2002

BRIEF ON BEHALF OF APPELLEE.

APPEAL FROM WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

RICHARD SAXE JONES,

Counsel for Appellee.

Office and Post Office Address: 409 Colman Bldg., Seattle, King County, Washington.

YERKES PRINTING CO., SEATTLE

NO. 1953

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

G. HEILEMAN BREWING COMPANY, *Appellant,*	
vs.	NO. 1953.
INDEPENDENT BREWING COMPANY, *Appellee.*	

BRIEF ON BEHALF OF APPELLEE.

In the limited time allowed us by the rules of this court we will not attempt to repeat the facts and law of this case, as laid down in our original brief filed in the court below.

While our standing in this court is not such that our brief in the court below would be recognized as a matter of history, nor any brief which we may have filed be

looked upon as of great historical value; yet insomuch as the Washington, District of Columbia, counsel for appellants have seen fit to incorporate our brief on pages 4 to 9 of their brief, and have thus claimed to have made it historical, we submit that that brief, brief as it is, is sufficient to cover all the matters set forth in the thirty-six pages of appellant's brief, excepting the entirely new question inserted into this case, beginning on page 26 of appellant's brief, which was not argued nor referred to in the court below, so far as memory serves us, and does not appear in the pleadings nor printed record.

This case was tried in the court below upon a demurrer to the bill of complaint, which complaint is a portion of the printed record, beginning with p. 2, and the bill covers nothing whatever except the *infringement of a trademark.*

The reading of the bill makes our review of it almost superfluous.

After the usual preliminary allegations, it begins on page 3 by reciting that the appellant uses a label for the manufacture of beer which was original with appellant, and that being the owner of said label it filed an application for trademark thereon on June 23, 1906; that such application was granted and a trademark was issued for the label, found as Exhibit "A," page 10 of the record.

The complainant then recites the nature of the label and that it had been adopted by the appellant on or before

Jan. 1, 1902 (there is no allegation of copyright); that it has been used Since Jan. 1, 1902, by the complainants.

That the defendant, meaning and intending to secure to itself portions of the good-will of the business of the complainant, in manufacturing and selling beer, "has used * * * in connection with the sale * * * * your orator's trademark in so nearly the exact form and configuration as employed by your orator as to deceive purchasers into believing that the beer the manufacture of the defendant was and is the beer manufactured by your orator." (P. 5, Printed Record.)

The complaint then goes on to say that in order that the court may be fully advised "of the flagrant imitation of your orator's trademark and label," the label trademarked by the defendant is attached and marked Exhibit "C." (P. 16, Printed Record.)

The complainant then goes on to show how one label and mark conflicts with the other by using the same upon cylindrical bottles, and that by the use of the *infringing label* the defendant is taking from the complainant business and profits to the complainant belonging.

On page 7 of the printed record the complainant further alleges that the business of manufacturing and selling beer "designated by the trademark and label" is of great value, and that the complainant "cannot with certainty state the amount it is entitled to recover from the defendant by reason of its infringement of your orator's

said trademark and label," but alleges the sum to be more than Three Thousand Dollars ($3000.00).

On page 8 of the printed record the complainant prays that the defendant may be adjudged to account for "the profits or gains thus unlawfully derived from the pirating of your orator's rights as well as the damages sustained by your orator by reason of the infringement of your orator's rights," and that the defendant may be assessed damages "sustained by your orator by reason of the defendant's infringement and piracy," and that the damages may be tripled in accordance with the statute (which, of course, is the statute in relation to the infringement of trademarks).

The complaint then prays for a writ of injunction enjoining the defendant from "infringing trademark and label or any material or misleading part thereof," and in the next clause asks for a writ of injunction against the "manufacturing, selling or using the trademark of your orator or any mark in simliarity thereof."

Appellant did not file nor serve any brief in the court below so far as the record shows, but this complaint shows clearly upon its face just exactly what the complainant complained of, and the argument made before the trial court, part of which was read from points and authorities prepared by complainant's counsel, was largely an answering argument to our brief, which they are kind enough to print in appellant's brief now before this court.

They printed our brief, which shows clearly that the only question submitted to the trial court was the question of infringement of a trademark, and we submit that that is the only question raised by the complaint, and that there is nothing in the present record before this court to show that the question which they now seek to raise, beginning on page 26 of their brief in this court; namely, the question of unfair competition in trade; was ever submitted to the trial court at all.

This court will not try a case upon appeal upon a theory which the record does not show to have been submitted to the court below. This is primer law.

Opposing counsel has shown this court, by quoting our brief, just what question was submitted to and determined by the trial court.

The complaint speaks for itself, and this court will not enter into a discussion of matters neither raised by the complaint nor in any wise argued to the court below.

This court would determine solely from the complaint and the demurrer thereto what questions were submitted to the trial court, were it not for the fact that appellant has seen fit to print our brief filed and submitted to the trial court, showing what questions were actually submitted, and it is clearly apparent that the only question submitted to the trial court was the question of infringement of the trademark.

We will not repeat the argument of our former brief,

a purported copy of which is found in appellant's brief, except to say:

1. The bill on its face includes Exhibit "A," which contains the words at the bottom of the label (P. 10, Printed Record) "Copyrighted 1902 by G. Heileman Brewing Co.," and it is upon the infringement of this label and this copy of the same that this case turns. There is no allegation nor pretension that the label conveyed the information required by law; that a trademark was claimed on its face, or that it had ever been published as properly registered as such.

The complaint shows that a fraud had been continuously perpetrated on the public by holding out this label as copyrighted (it being so printed on the face of the label, which is made a part of the complaint) from the year 1902, and no explanation in regard to this has ever appeared until it appears in the voluntary statement in complainant's brief that such a copyright actually did exist. There is nothing in the record to sustain this statement, and no allegation in the complaint to relieve it from this question upon demurrer. (See quotation from our brief, pp. 4 and 5, of appellant's brief.)

There is nothing in the complaint to show that the trademark or label were ever properly registered, or if registered ever contained when used the words required by Sec. 28 and Sec. 29 of the Act of Feb. 20, 1905, and this is admitted by appellant's brief.

There is absolutely no conflict between the two labels sufficient to be worthy of notice, and the trial court so held. The similarity between the trademarks must be such as to raise a presumption of a design to deceive the public, and this has been held by all the courts, and every case cited by appellant in its brief asserts that the essence of fraudulent interference is an attempt to deceive the public by one party trying to palm off his goods as the goods of any other party.

The cases cited all through appellant's brief contain this language in one form or another, but we will particularly refer to the decision in this district written by Mr. Justice Morrow, in which the law applicable to such case is clearly stated in a very few words, as follows:

"The law applicable to this case may be stated in a very few words. It requires the defendant, in offering his goods to the public, to use such method of wrapping, labeling and catalogueing of his packages as not to lead an intending purchaser of *ordinary intelligence* using *ordinary care,* into the mistaken belief that he is purchasing goods placed upon the market by complainant."

Keuffer & Esser Co. vs. H. S. Crocker Co., 118 Fed. Rep., p. 190.

No person of any kind of intelligence, not to mention ordinary intelligence, nor using any kind of care, not to mention ordinary care, could look for one moment at complainant's Exhibit "A" found in the complaint, and then at Exhibit "C," found in the complaint, in which the principal words in large letters in Exhibit "A" are "G.

Heileman Brewing Co., La Crosse, Wis.," and the principal words in large letters on Exhibit "C" are "The Independent Brewing Co., Seattle, Wash.," and believe for one moment that either of these labels was intended to impose the goods of one person upon the public as manufactured by somebody else. The labels speak for themselves; one a green label, the other in orange; one in large black letters stating the fact that it represents "Old Style Lager" manufactured by the La Crosse concern, and the other in equally large letters setting forth that it represents "Old German Lager" manufactured by a Seattle institution; one consisting principally of the pictures; and not a single picture represented in both of the labels.

The contrast between this case and the case cited with so much force by appellants on page 21 of their brief, *National Water Co. vs. O'Connell, et al.*, 159 Fed., 1001, will appeal to this court when an examination is made of the latter case and the label there infringed.

In the National Water Co. case the label was "White Rock" Lithia water, the infringing label was "High Rock" Lithia water; the same character of bottles were used, exactly the same colors; the same design and form of the label, so as absolutely to deceive any person unless they took pains to examine the label with great care. The court there properly said:

"Upon the labels alone * * * * I rest the decision of this court * * * * I venture to affirm that

* * * * the observer of ordinary care and intelligence would readily mistake one for the other * * * * he would be satisfied that defendant's label was deliberately devised * * * * to deceive purchasers."

Gross fraud is apparent in that case and the lack of it equally apparent to this court, as it was to the trial court, upon examination of Exhibits "A" and "C" set forth in the complaint in this action.

* * * * * * * * *

We have simply pointed out the suggestions made in our brief before the trial court, and turn now to the "resume" of appellant's argument found on page 35 of their brief in this court, following the order and numbering of appellant:

1. That the demurrer is bad, as far as it may be considered a special demurrer, in that it does not point out the special fraud which it alleges the complainant has been guilty of.

Appellant evidently assumes that this is a plea in bar upon the ground of fraud. It cites no authorities to this suggestion, and can cite none, for in order that this part of the demurrer shall be sustained it must appear upon the face of the complaint. All material facts properly pleaded in the complaint are admitted by the demurrer, therefore it is that we rely upon their own pleading and their own Exhibit "A," which shows upon its face a fraud practiced upon the public contrary to the statute of the United States specially providing what shall be printed upon a trademark label, and the com-

plaint itself shows that they have printed upon their trademarked label (trademarked in 1907) a claim that it is a copyrighted label of 1902, and there is not a single allegation of the complaint to overcome their *prima facie* allegation of their own fraud.

2. That considered as a general demurrer it can prevail only if the court finds that there is "*no scintilla*" of relief which could possibly be afforded complainant under the pleading.

This statement of the law finds no substantiation.

It has long been a maxim of the law that courts will not deal with trifles, nor entertain actions for purely moot purposes.

If there is any *substantial* relief to which complainant is entitled by its complaint, then the court will entertain the same, but the submission of a general demurrer as in the case at bar, brings before the court the fact that there are not sufficient facts stated in the complaint to entitle complainant to any *substantial* relief. The facts stated in this complaint show that there is no conflict of labels nor trademarks, and the very fact that both parties hold a trademark for their separate labels, is of itself sufficient to create a presumption that no conflict exists.

3. That no attack has been made upon the allegation of unfair competition in trade, and such unfair competition is properly pleaded, and relief should have been

granted under that head, even if the allegation of infringement under trademark is not sustained.

This subdivision of their resume brings up the new question inserted in this case in this court, beginning on page 26 of their brief, and we go into it with reluctance, as we do not think that it is properly here for argument, but yet feeling that no harm can be done to have this court determine that the complaint itself does not show facts constituting any fraudulent, unlawful or improper attempt at unfair competition in trade, we accept the challenge.

We will not trouble the court except as a suggestion that if two causes of action are stated in this complaint, they are not properly segregated, nor can any one determine where the one begins and the other ends.

We are willing to abide by the statement of the law made by Judge Morrow in this circuit, in the case heretofore cited (118 Fed. Rept., pp. 187-190) and the principle laid down in every case cited by appellant, or found by us in examination of this question; namely, that the defendant can only injure the complainant by so labeling, wrapping or catalogueing his product as to lead an ordinarily intelligent purchaser to believe that he was buying the goods of the complainant, not the goods of the defendant.

That is what constitutes unfair competition in trade. No such allegation is separately nor sufficiently made in

the complaint, but the complaint on its face shows that no such result could possibly be arrived at by the use of the trademarked labels Exhibits "A" and "C." On page 28 of appellant's brief it admits that this question was not raised in the court below, and uses the following language:

"No argument was made and nothing said in the brief of defendant below relative to an insufficiency of statement, or any shortcoming of the bill on the charge of unfair competition in trade."

The fact that it was not referred to in the court below was because it was not in the case, but if it were in the case there is not a single authority referred to by opposing counsel which would be in point in any way in determining this question in this court.

The case of *Stewart vs. Masterson,* 131 U. S., p. 151, is first referred to on page 28 of appellant's brief. The syllabus of that case is plain, concise and complete, and we quote the material part of it:

"A demurrer cannot introduce, as its support new facts which do not appear on the face of the bill, and which must be set up by a plea or answer."

"Where there is matter properly pleaded in a bill which is proper ground for equitable relief, and which requires an answer or a plea, a demurrer to the whole bill ought to be overruled."

The question at issue was clearly whether an amended bill in that case set up sufficient *additional* facts to take it out of the ruling *upon the demurrer to the original bill,* and we will not waste time upon any argument

upon this question, nor upon the succeeding question supposed to be raised at the bottom of page 29 of appellant's brief, that a demurrer to a whole bill cannot be held good where part of the bill sets up a cause of action.

* * * * * * * * *

The first case anywhere, in point in the argument in this case is referred to on page 31 of appellant's brief, being the case of *Putnam Nail Co. vs. Bennett,* 43 Fed. Rep., p. 800, where Mr. Justice Bradley says that whether a trademark is good or not, if the defendant has imitated a trademark for the purpose of deceiving, and has deceived the public thereby, and induced them to buy goods of the defendant's in the belief that they were the goods of the complainant, it is a fraud.

This statement of the law is exactly the statement upon which we have relied in the lower court, and is practically the same as that laid down by Judge Morrow in 118 Fed. Rep., pp. 187-190.

The case of *Holeproof Hosiery Co. vs. Richmond Hosiery Mills,* 167 Fed. Rep. 381, is not in point at all, and we quote the syllabus, which shows exactly what was decided:

"Where a bill states a cause of action which entitles complainant to relief against the use by defendant of certain trademarks and names *in combination,* it will not be held demurrable, because he may not be entitled to enjoin their use *separately,* or to relief to the full extent prayed for."

This is primer law, and the quotation set forth in ap-

pellant's brief on page 33 from this decision, has about as much to do with the case at bar as appellant's voluntary statement that it copyrighted its trademark or label in 1902.

Appellants next rely upon the case of *Standard Varnish Works vs. Fisher, Thorsen & Co.,* 153 Fed. Rep., p. 928, and volunteer the statement that it is exactly in line with the previous quotations and citations; but in the next sentence they take back the statement which they have made, and we quote their language:

"Judge Wolverton, however, does not use any particular sentence or paragraph which is particularly applicable to this case, the whole case being, however, exactly in point."

An examination of this case in the reports shows that Judge Wolverton does not even state what was contained in the pleadings, nor can this court determine whether the case is in point or not unless it be from the following which we quote:

"The principle that one person or firm should not sell his goods as the goods of another person or firm lies at the bottom of the legal objection."

This is the law and if there is anything in the two labels shown as Exhibit "A" and Exhibit "C" of complainant's complaint by which it can be determined that the Independent Brewing Co. of Seattle, Washington, is trying to sell Independent Brewing Company's beer as being made by G. Heileman Brewing Co. of La Crosse, Wis., one thousand miles away, then this statement of

the law is of value in arriving at a determination as to whether the complaint in this action constitutes a cause of action.

Counsel for appellant go to the extreme in the very next part of the same sentence at the top of page 34 of their brief when, after apologizing for the citation of 153 Fed. Rep. at p. 928, they say:

"As is also another case from this circuit, and also from the court of Oregon, *Pacific Livestock Co. vs. Hanley, et al.,* 98 Fed. Rep. 327."

There is nothing in that case that is even slightly in point unless it be under the old theory that because in one case "apples" were mentioned, and in another case "peaches," the two might be cited to sustain the decision of either.

These are all of the important cases cited by our opponent, and the whole argument on this subject reminds us of the physician who had treated his patient for three weeks for tonsilitis, and had required the wife of the patient to apply hot bandages to the throat under the left ear hourly for three weeks. Finding the patient approaching death, he called in other counsel, and the other physician after carefully examining the patient, found that he had no tonsils; that they had been removed in early life, and further discovered that the patient had pneumonia. The family physician, who had first been called, it is said, advised the following:

"Now, say nothing to the wife, but send out and get a trained nurse, and I will have the wife continue the hot applications to the throat while the trained nurse treats the lungs for pneumonia. If the wife should find out that her husband had not been properly treated, it might cause severe nervous reaction, and possibly her death."

The man died of pneumonia.

It is clearly apparent that the learned counsel from Washington, D. C., finding that Seattle counsel had improperly treated this case as one of incipient trademark, determined to change the disease and to cure an aggravated case of unfair competition in trade.

The patient may die of the latter disease.

4. That the court erred in holding as a matter of law that the two labels were so dissimilar as to relieve defendant's label from any charge of infringement, such assignment of error being the subject of numerous decisions hereinbefore cited.

Appellant states at various times in its brief that this is probably the real basis of the decision of the trial court sustaining our demurrer, and if such can be determined as the view of the trial court we are willing to stand by it.

Appelant's counsel are inconsistent in their arguments as to what the trial court did decide.

On page 3 of their brief they say that "the order sustaining the demurrer entered in the court below does not enumerate upon what ground the order is entered * * * it is only by going to the brief and argument

interposed by the appellee that any light is thrown upon the question."

Then, on page 17 of their brief, they say:

"From the remarks of the Judge from the bench in the court below and during the hearing, it is believed that no great amount of consideration was given to the subject hereinbefore discussed."

And now, on page 35 of their brief, they pretend to know upon what basis the trial court sustained the demurrer.

In other words, they have *no way* of ascertaining the fact, except from appellee's brief; they then ascertain it from the remarks of the court, and then *determine* it in their own "resume." Accepting this proposition from their "resume" we maintain that the trial court must be upheld in its decision that these two labels were so dissimilar as to relieve defendant's label of any charge of infringement.

On this subject appellants, at page 20 of their brief, refer to the case of *Eagle White Lead Co. vs. Pflugh*, 180 Fed. Rep. 579, as fairly in point.

In that case an eagle was used, together with the designation "Eagle White Lead Co." by the complainant.

An eagle was used with the words "Gold Eagle," referring to white lead paint by the defendant. What greater fraud could be attempted, and we ask this court where, in the label of the Heileman Brewing Co. and the

label of the Independent Brewing Co., both of which have been trademarked by the United States officers authorized to issue trademarks, is there any possibility of such fraud?

Appellants cite also (at page 21 of their brief) the case of the *National Water Co. vs. O'Connell,* to which we have heretofore referred, and in the report of that case pictures of the labels are given, and no one could possibly look at them as set forth on the pages of the Federal Reporter and not know that a deliberate fraud had been intended; but where, we ask, in the case at bar can the language of Judge Morrow (118 Fed. Rep., p. 190) apply; that a purchaser of ordinary intelligence, using ordinary care, could enter into the mistaken belief that he was purchasing the goods placed upon the market by Heileman Brewing Co. of La Crosse, Wis., when he bought the goods in Seattle, Washington, manufactured by the Independent Brewing Company, and so labeled in big, black letters on an entirely different label?

5. That defendant's contention relative to the copyright law applying to trademarks and the trademark law applying to copyrights is wholly fallacious and based upon a lack of understanding of the statute relative to these two subjects.

Under this heading appellant's counsel have devoted practically all of pages 11, 12, 13, 14 and 15 of their brief, and we have not a word to say in regard thereto.

We only referred to the copyright law as showing that appellant was advertising to the public that it had a copyright of its label in 1902, and then sued for an infringement of a trademark issued in 1907 which their own label did not refer to.

We never contended that the copyright law applied to trademarks or that the trademark law applied to copyrights, and inasmuch as appellant's counsel quote our brief from pages 4 to 9 of their own brief, we do not hesitate to say that they knew when they printed page 35 of their own brief that this "resume" No. 5 was never raised by us in any manner or form, but is simply inserted in their brief (pages 11 to 15) in an attempt to mislead the court. It can have no other purpose.

6. That this court should reverse the court below and remand the case with directions to enter a decree in favor of complainant and against the defendant in accordance with the prayer of the bill and direct a reference to a Master for accounting and discovery.

We are not worrying about what this court will do in its decision of this case. We do not believe that it will reverse the lower court.

This proposition No. 6 is based upon the case cited on page 34 of appellant's brief, *Dillon vs. Barnard,* 88 U. S. 430.

In that case there was no contention *except one of law.* As the court properly says: "It is a case where

the contention arises wholly upon the meaning of the indenture and upon its bearing on the contract."

But counsel for appellant seem to think that this court, after reading thirty-six pages of their brief, to show this court that serious *questions of fact* are involved; and, beginning with page 26, attempting to induce this court to believe that the real question at issue is whether there has been any unfair competition in trade between these two business houses, separated one thousand miles apart, neither of whom we believe ever sold a single bottle of beer in the same town with the other; as we say, after spending the time of this court and of themselves in urging upon this court that questions of fact are involved, and this case *ought not* to have been determined upon the law; counsel then turn about and ask this court to reverse the lower court and enter a decree without hearing the facts. Is this good legal ethics, or within any ruling of any court?

In conclusion we refer this court to our original brief printed on pages 4, 5, 6, 7, 8 and 9 of appellant's brief, and maintain that on every point raised appellant's complaint failed to properly state a cause of action; that it shows upon its face that the complainant relies upon its own fraud for recovery, printing upon its own label a claim of copyright, which it does not even allege that it ever had.

Failing to print upon its label the registry requirements of the United States patent office, under the Act

of Feb. 20, 1905, and publishing its label for years before it ever registered it as a trademark.

That there is absolutely no conflict between the two labels; they are as different as black and white, and transposing the expression of Judge Morrow, "no person of ordinary intelligence using ordinary care could ever be led into the mistake of believing that he was purchasing Heileman Brewing Company's La Crosse, Wisconsin, 'Old Style Lager' beer when he did purchase the Independent Brewing Company's 'Old German Lager' made in Seattle, Washington."

The whole case seems to us to be almost an imposition upon the court in attempting to obtain a decision, which could be of little value to the party complaining and not based upon allegations sufficient to constitute any cause of action.

Very respectfully submitted,

RICHARD SAXE JONES,

Counsel for Appellee.

NO. 2005

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WILLIAM ROONEY, JOHN JUNKIN, G. W. JOHNSON and AUGUST PLASCHLART,

Plaintiffs in Error,

vs.

E. T. BARNETTE, J. C. RIDENOUR, HENRY COOK, JOHN L. McGINN, M. L. SULLIVAN, ATWELL & RILEY, a Mining Copartnership, Composed of C. B. ATWELL and J. E. RILEY, ENSTROM BROS., a Mining Copartnership, Composed of L. ENSTROM and O. ENSTROM, and AUGUST PETERSON,

Defendants in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the Territory of Alaska, Fourth Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F.

NO. 2005

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WILLIAM ROONEY, JOHN JUNKIN, G. W. JOHNSON and AUGUST PLASCHLART,

Plaintiffs in Error,

vs.

E. T. BARNETTE, J. C. RIDENOUR, HENRY COOK, JOHN L. McGINN, M. L. SULLIVAN, ATWELL & RILEY, a Mining Copartnership, Composed of C. B. ATWELL and J. E. RILEY, ENSTROM BROS., a Mining Copartnership, Composed of L. ENSTROM and O. ENSTROM, and AUGUST PETERSON,

Defendants in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the Territory of Alaska, Fourth Division.

INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

LOUIS K. PRATT, Fairbanks, Alaska,

R. W. JENNINGS, 322 Leary Bldg., Seattle, Wash.,

Attorneys for Plaintiff in Error.

McGINN & SULLIVAN, Fairbanks, Alaska,

Attorneys for Defendants in Error.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

WILLIAM ROONEY et al.,

Plaintiffs in Error,

vs.

E. T. BARNETTE et al.,

Defendants in Error.

Stipulation as to Printing Record.

IT IS HEREBY STIPULATED that in printing the record of this cause, after the caption and title has once been printed, the same may be omitted with reference to all other papers connected therewith, and the words "caption and title" substituted therefor, followed by the appropriate name of the paper; also that of the papers connected with the Writ of Error, the following only need be printed, viz.: Assignment of Error, Writ of Error, Citation, Designation of Place of Trial, Order Extending Return Day of Writ of Error; also that after the file-marks on the pleadings in the cause, Bill of Exceptions and the transcript have been printed all

other file-marks may be omitted.

Dated at Fairbanks, Alaska, June 12th, 1911.

LOUIS K. PRATT and
R. W. JENNINGS,
Attorneys for Plaintiffs in Error.
JOHN L. McGINN,
Attorney for Defendants in Error.

[Endorsed]: No. 2005. United States Circuit Court of Appeals, Ninth Circuit. William Rooney et al., Plaintiffs in Error, vs. E. T. Barnette et al., Defendants in Error. Stipulation as to Printing Record. Filed Jul. 17, 1911. F. D. Monckton, Clerk.

In the District Court, Territory of Alaska, Third Division.

No. 1196.

WILLIAM ROONEY, JOHN JUNKIN, G. W. JOHNSON and AUGUST PLASCHLART,
Plaintiffs,

vs.

E. T. BARNETTE, J. C. RIDENOUR, HENRY COOK, JOHN L. McGINN, M. L. SULLIVAN, ATWELL & RILEY, a Mining Copartnership, Composed of C. B. ATWELL and J. E. RILEY, ENSTROM BROS., a Mining Copartnership Composed of L. ENSTROM and O. ENSTROM, and AUGUST PETERSON,
Defendants.

Complaint.

The plaintiffs for a cause of action against the defendants above named allege:

I.

That at all the times mentioned in this complaint, the defendants C. B. Atwell and J. E. Riley have been and now are mining copartners under the firm name and style of Atwell & Riley, and the defendants L. Enstrom and O. Enstrom have been and now are mining copartners, under the firm name and style of End*s*trom Brothers.

II.

That at all times since September 21st, 1905, the plaintiffs have been and now are the owners in fee, as against all persons other than the United States, of that certain parcel of placer mining ground containing twenty acres situate in the Fairbanks mining and recording precinct, in the Territory of Alaska, more particularly described as the first tier of bench claims on the right limit, adjoining creek claim No. 3 below discovery on Dome creek. That ever since said 21st day of September, 1905, and at this time, the plaintiffs have been and now are in the possession of the said mining property except as such possession has been interfered with by the wrongful acts of the defendants and except as defendants have wrongfully ousted plaintiffs of possession of the larger portion of the said ground as is more fully hereinafter set forth. That plaintiffs at all times hereinafter mentioned have been and now are entitled to the possession as against

the defendants of the said bench claim and the whole thereof.

III.

That in the month of September, 1908, the defendants wrongfully, forcibly and against the protests of these plaintiffs intruded themselves upon the said bench claim and forcibly ousted plaintiffs of their possession thereof except the possession of the cabin thereon built and occupied by them and the space immediately around the same and necessary for its use as a place of abode, and ever since and now forcibly retain in their exclusive possession all of said bench claim with the exception above stated.

IV.

That since so taking such wrongful and forcible possession of the portion of said bench claim above described, the defendants have placed thereon extensive mining plants and have heretofore and now are mining said bench claim with the machinery belonging to such mining plants, and a large force of workmen, and have mined and raised to the surface and placed in dumps thereon a large quantity of auriferous gravel containing gold-dust of the value of $70,000.00, and are now engaged in and preparing to mine out and exhaust the pay-streak on said bench claim and convert to their own use the gold-dust extracted therefrom, all to the damage of plaintiffs in the sum of $700,000.00.

Wherefore, the plaintiffs pray judgment against the defendants for the possession of the portion of said bench claim so above described as so wrongfully withheld and for damages in the sum of $700,000.00,

and for the costs and disbursements of the action.

Fairbanks, Alaska, Mch., 1909.

JAMES WICKERSHAM,
HENRY RODEN,
LOUIS K. PRATT,
Plffs. Attys.

Territory of Alaska,
Fairbanks Precinct,—ss.

William Rooney, being first duly sworn, deposes and says: That I am one of the plaintiffs named in the foregoing complaint, in the above-entitled action; that I have heard the same read, know the contents thereof, and that I believe the same to be true.

WILLIAM ROONEY.

Subscribed and sworn to before me this 3d day of March, 1909.

[Notarial Seal] LOUIS K. PRATT,
Notary Public in and for Alaska.

[Endorsed]: Filed Mar. 3, 1909.

[Caption and Title.]

Supplemental Complaint.

Come now the plaintiffs, leave of the Court first having been obtained in that behalf and file this, their supplemental complaint, and allege:

I.

That since filing their complaint in this cause on the 3d day of March, 1909, and continuously up to this date, the defendants have remained in possession, trespassed upon and mined for placer gold with extensive mining machinery and a large number of

men the mining ground belonging to the plaintiffs and described in their complaint, and in so doing, have mined, raised to the surface and washed up the auriferous gravels lying at and about the bedrock on said ground, and have extracted the gold-dust thereupon of the value of Four Hundred Thousand ($400,000.00) Dollars, and have converted all thereof to their own use, and have thereby wasted and destroyed the value of the said mining property, the same being valuable only for the placer gold contained therein, to the damage of the plaintiffs in the sum of Seven Hundred Thousand ($700,000) Dollars.

Wherefore the plaintiffs pray judgment against the defendants in the said sum of Seven Hundred Thousand ($700,000) Dollars as demanded in their original complaint.

LOUIS K. PRATT.
R. W. JENNINGS.

United States of America,
Territory of Alaska,—ss.

John Junkin on oath says: I am one of the plaintiffs in the above-entitled action, have read the foregoing supplemental complaint, am familiar with the allegations therein contained, and the same are true as I verily believe.

JOHN JUNKIN.

Subscribed and sworn to before me this 7th day of October, 1909.

[Notarial Seal] LOUIS K. PRATT,
Notary Public for Alaska.

Received a copy of the above Supplemental Complaint this 11th day of October, 1909.

JOHN L. McGINN,
Attorney for Defendants.

[Endorsed]: Filed Oct. 12, 1909.

[Caption and Title.]

Amended Answer.

Come now the above-named defendants and by leave of Court first had and obtained, file this their amended answer to the complaint of plaintiff and also their answer to the supplemental complaint of plaintiff:

I.

ADMIT that the defendants C. B. Atwell and J. E. Riley have been and at the time of the institution of this action were mining copartners under the firm name and style of Atwell & Riley, but DENY that they were copartners during all of the times mentioned in the complaint.

II.

ADMIT that the defendants L. Enstrom and O. Enstrom ever since the month of September, 1908, have been and now are copartners under the firm name and style of Enstrom Brothers, but DENY that said copartnership existed at all the times mentioned in the complaint.

III.

DENY each and every allegation, matter and thing contained in paragraph II of said complaint and each and every part and the whole thereof.

IV.

DENY each and every allegation, matter and thing contained in paragraph III of said complaint and each and every part and the whole thereof.

V.

DENY each and every allegation, matter and thing contained in paragraph IV of said complaint and each and every part and the whole thereof.

And the defendants for answer to the supplemental complaint DENY each and every allegation, matter and thing contained therein, save and except as hereinafter stated.

And the defendants for a FIRST, FURTHER AND SEPARATE ANSWER AND DEFENCE to the complaint of plaintiffs allege:

I.

That Henry Cook, J. C. Ridenour, A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk and A. R. Armstrong, M. L. Sullivan and John L. McGinn are now and for a long time prior to the commencement of this action have been the owners in fee as to all persons save and except the United States, in possession of and entitled to the possession of that certain piece of placer mining ground situate in the Fairbanks Recording District, District of Alaska, and more particularly described as follows, to wit:

That certain placer mining claim known as the DOME GROUP, situate on the right limit of Dome Creek, and adjoining Creek Claims Numbered One, Two, Three, Four and Five Below Discovery on said Creek, said property being more particularly marked

upon the ground as follows:

Commencing at the initial stake which is placed at the west side of said claim and near the side line of Creek Claim No. 1 below Discovery on Dome Creek; thence 660 feet in a northwesterly direction to Stake No. 1; thence 660 feet in a northwesterly direction to Stake No. 2; thence 660 feet in a northwesterly direction to stake marked No. 3; thence 660 feet in a northerly direction to stake marked No. 4; thence 660 feet in a northerly direction to stake marked No. 5; thence 660 feet in a northerly direction to stake marked No. 6; thence 660 feet in a northwesterly direction to a stake marked No. 7; thence 660 feet in a northwesterly direction to a stake marked No. 8; thence 330 feet in a northwesterly direction to a stake marked No. 9; thence 660 feet in a northeasterly direction to a stake marked No. 10; thence 660 feet in a southeasterly direction to a stake marked No. 11; thence 660 feet in a southeasterly direction to a stake marked No. 12; thence 660 feet in a southwesterly direction to a stake marked No. 13; thence 660 feet in a southerly direction to a stake marked No. 14; thence 660 feet in a southeasterly direction to a stake marked No. 15; thence 660 feet in a southeasterly direction to a stake marked No. 16; thence 660 feet in an easterly direction to a stake marked No. 17; thence 660 feet in a southeasterly direction to a stake marked No. 18; thence 660 feet in a southeasterly direction to a stake marked No. 19; thence in a southeasterly direction to a stake marked No. 20; thence 660 feet in a southeasterly direction to a stake marked No. 21; thence 660 feet in a southeasterly direction to a stake

marked No. 22; thence 660 feet in a southwesterly direction to a stake marked No. 23; thence 660 feet in a southwesterly direction to a stake marked No. 24; thence 660 feet in a northwesterly direction to a stake marked No. 25; thence 660 feet in a northwesterly direction to the initial stake or place of beginning.

II.

That the property mentioned and described in plaintiffs' complaint is a part or portion of said Dome Group Association claim hereinbefore more particularly described; that the plaintiffs herein have no estate, right or interest in or to said Dome Group or to any part or portion thereof.

And the defendants for a FURTHER AND SEPARATE ANSWER and DEFENCE to the complaint of plaintiffs allege:

I.

That said defendants E. T. Barnette, J. C. Ridenour, Henry Cook, M. L. Sullivan and John L. McGinn, are now and for a long time prior to the commencement of this action have been the owners in fee as to all persons save and except the United States in possession of and entitled to the sole and exclusive possession of that certain piece of mining ground situate in the Fairbanks Recording District, District of Alaska, and more particularly described as follows, to wit:

Placer mining claim Number Three below Discovery on first tier, right limit of Dome Creek, containing approximately twenty acres, and which said claim adjoins Creek Claim Number Three below Dis-

covery on said Dome Creek.

II.

That the plaintiffs herein have no estate, right or interest in or to said property or to any part or portion thereof.

And the defendants for a FURTHER, SEPARATE AND AFFIRMATIVE ANSWER, allege:

I.

That the defendant J. C. Ridenour is now and for a long time hitherto has been the owner in fee as to all persons save and except the United States, in possession and entitled to the sole and exclusive possession of that certain piece of placer mining ground situate in the Fairbanks Recording District, District of Alaska, and more particularly described as follows, to wit:

Commencing at a point about 15 feet east from the northeast corner of that certain placer mining claim commonly known and designated as Bench Claim No. 2 Below Discovery, first tier, right limit, on Dome Creek; thence in a northerly direction about 475 feet to a stake placed in the ground and designated as stake No. 2; thence in a westerly direction about 236 feet to a stake placed in the ground and designated as No. 3; thence in a northerly direction about 840 feet to a stake placed in the ground and marked Northeast corner; thence west about 325 feet to a stake marked Northwest corner; thence in a southerly direction about 1350 feet to a stake which marks the southwest corner; thence in an easterly direction about 550 feet to the point of beginning.

II.

That said property so described includes the larger portion of the property mentioned and described in plaintiffs' complaint; that the plaintiffs have no estate, right, title or interest in or to said property, or to any part or portion thereof.

And the said defendants for a FURTHER AND SEPARATE ANSWER AND DEFENCE to paragraphs 3 and 4 of the Complaint and to the Supplemental Complaint, and by way of partial defence to plaintiffs' cause of action set forth in their complaint, allege:

I.

That in the month of September, 1908, and for a period long prior thereto, the title and the right of possession of that certain placer mining claim known and described as number three below discovery, first tier, right limit of Dome Creek, was in dispute between Henry Cook, J. C. Ridenour, A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk and A. R. Armstrong, and one Richard Stafford.

II.

That during the time that said property was in controversy and in the month of September, 1905, the said Richard Stafford and his co-owners in said property, F. De Journel, H. J. Miller and R. M. Crawford, leased and let to Tracy Hope a divided one-half of said claim, commencing at a point about 350 feet downstream from the upper end of said claim.

III.

That in the month of February, 1906, the defendant C. B. Atwell and A. H. Bryant, acquired an undivided one-half interest in said lay from said Tracy Hope, and immediately thereafter began working upon said property under and by virtue of said lease, and continued to work and mine upon said property until the month of August, 1906, when they were restrained by an injunction issued out of the District Court for District of Alaska, Third Division, in that certain action entitled Henry Cook et al. vs. John Klonos et al., and being Number 278; that up to the time of the granting of said injunction the defendant Atwell and his colessees had expended in opening up said property and erecting suitable buildings and placing proper machinery thereon, approximately the sum of $20,000.00; that said injunction remained in full force and effect until the 3d day of June, 1907.

IV.

That in the month of July, 1906, the said Tracy Hope transferred his undivided one-half interest in said lay to W. D. Stewart and S. Simonson; that immediately after the dissolution of said injunction above mentioned the defendant Atwell and his colessees again begain to work and mine said property and continued so to do until they were enjoined in that certain action entitled Henry Cook et al. vs. the defendant Weimer et al., and which said cause is No. 798, and which said injunction continued in force and effect until the month of September, 1908.

V.

That in the month of September, 1908, said litigation over said property was terminated and ended, the defendants herein, E. T. Barnette, Henry Cook, J. C. Ridenour, M. L. Sullivan and John L. McGinn having acquired all the right, title and interest of the said Richard Stafford and his co-owners, F. De Journel, H. J. Miller and R. M. Crawford; that at the time of said settlement and as a part thereof, it was agreed between the said E. T. Barnette, Henry Cook, J. C. Ridenour, M. L. Sullivan and John L. McGinn that the defendants herein, C. B. Atwell and J. E. Riley, who had in the month of July, 1907, acquired all the right, title and interest of the said Stewart and Simonson and Bryant in and to said leasehold estate, should continue to mine upon said property as their lessees, on condition that the amount of royalty specified in the lay granted them by Richard Stafford and his co-owners should be increased from 25% to 33 1/3%.

VI.

That immediately after said settlement above mentioned, the defendants Atwell and Riley began active mining operations upon said property and continued to carry on active and extensive mining operations thereon until about one month ago, when the said Atwell and Riley surrendered up and abandoned their said lay; that the said Atwell and Riley carried on their said mining operations on said property in good faith and under the firm belief that their said lessors were the owners of said ground, and expended in opening up said property and in mining the same

over the sum of $100,000.00; that the said mining operations so conducted and carried on by the said Atwell and Riley resulted in a loss to them of approximately $25,000.00.

VII.

That under the terms of said lease the said Atwell and Riley were to pay to the defendants E. T. Barnette, J. C. Ridenour, Henry Cook, M. L. Sullivan and John L. McGinn 33⅓% of the gross amount of gold mined and extracted from said property, but in the month of May, when it was ascertained from the mining operations that had been carried on upon said property by the defendants Atwell and Riley that they could not work said property upon a 66⅔ per cent basis said amount was increased by the said lessors to 75%, the said Atwell and Riley under said new arrangement to pay to the said lessors 25% of the gross amount of gold mined and extracted from said property; that the actual cost of working said ground and extracting the gold and gold-dust therefrom cost the said defendants Atwell and Riley more than 75% of the gross amount of gold mined and extracted from the same, and their said mining operations carried on and conducted upon said property resulted in a substantial loss to them.

VIII.

That in the month of October, 1905, the said Richard Stafford, H. J. Miller, F. De Journel and R. M. Crawford demised and let unto Weimer and Ness the lower portion of said claim, immediately joining the leasehold estate hereinbefore described, to the lower end line of said claim; that in the month of No-

vember, 1905, the said Weimer and Ness entered upon said property under and by virtue of their said lease and began the sinking of holes thereon for the purpose of mining said ground, and continued their work thereon faithfully and continuously until they were enjoined by the District Court for District of Alaska, Third Division, in that certain cause entitled Cook et al. vs. Klonos et al., Numbered 278, which said injunction remained in full force and effect until the month of June, 1907; that thereafter and in the month of August, 1907, another injunction was obtained against the said Weimer and Ness, which said injunction continued in full force and effect until the month of September, 1908; that at the time of the settlement hereinbefore referred to and as a part thereof, the defendants E. T. Barnette, J. C. Ridenour, Henry Cook, M. L. Sullivan and John L. McGinn, agreed with the said Weimer and Ness that they might continue in the possession of said ground and mine and work the same under said persons as lessees and upon the terms expressed in their original lease.

IX.

That immediately after said settlement was entered into and in the month of September, 1908, the defendants, Enstrom Brothers, purchased from the said Weimer and Ness, all of their right, title and interest in and to said leasehold estate, and said Enstrom Brothers immediately entered into the possession of said property and began carrying on mining operations thereon; that the said Enstrom Brothers have expended in opening up and develop-

ing the said property a large sum of money, to wit, the sum of $46,787.00; that said Enstrom Brothers acquired their interest in said lease in good faith under an honest and firm belief that the said E. T. Barnette, J. C. Ridenour, Henry Cook, M. L. Sullivan and John L. McGinn were the owners of said property as to all persons save and except the United States.

X.

That under the terms of said lay agreement said Enstrom Brothers were to pay to their lessors 25% of the gross amount of gold mined and extracted from said property; that immediately after acquiring their said interest the said Enstrom Brothers began active mining operations upon said property and ever since said time have been and now are carrying on mining operations thereon; that said mining operations cannot be carried on at a profit upon the terms specified in their said lay and the actual cost of working said ground and extracting gold therefrom has cost the said Enstrom Brothers more than 75 per cent of the gross amount of gold mined and extracted from the same, and has resulted in a loss to said Enstrom Brothers of a large sum of money, to wit, about the sum of $10,000.00.

XI.

That in the month of September, 1908, the defendants E. T. Barnette, J. C. Ridenour, Henry Cook, M. L. Sullivan and John L. McGinn let and demised to the defendant August Peterson the upper 350 feet of said placer mining claim No. 3; that immediately after the giving of said lay the defendant Peterson

entered upon said property and began active mining operations thereon and installed the necessary plant and machinery and erected the necessary buildings for successful mining operations thereon; that under the terms of said lay agreement the said August Peterson was to pay to his said lessors 33⅓ per cent of the gross amount of gold mined and extracted from said property, to wit, the upper 350 feet of said placer mining claim No. 3, but in the month of April, 1909, and when it was determined from the character and quality of the pay gravel contained within said property that it would be impossible for the said August Peterson to work said property without substantial loss to him, his said lessors increased the percentage from 66⅔ per cent to 75 per cent, said lessors reserving to themselves 25 per cent of the gross amount of gold mined and extracted from said property as rent or royalty.

XI.

That the defendant Peterson has expended in opening up said property and in extracting the gold and gold-dust therefrom large sums of money; that said mining was carried on and said money expended by him in good faith and in the firm and honest belief that the property so covered by his said lay was the property of the defendants E. T. Barnette, J. C. Ridenour, Henry Cook, M. L. Sullivan and John L. McGinn.

XII.

That owing to the character of the ground and the poor quality of the pay the said Peterson has not been able to realize a profit from his said mining

operations, but, on the contrary, said mining operations carried on and conducted upon said property have resulted in a substantial loss to him, to wit, of the sum of about $12,500.00.

XIII.

That the defendants E. T. Barnette, J. C. Ridenour, Henry Cook, M. L. Sullivan and John L. McGinn have only received from said property the amounts that have been reserved by them as royalty.

Wherefore these defendants having answered said complaint, demand that they have judgment against the plaintiffs ordering and adjudging that the plaintiffs are not entitled to the possession of the property mentioned and described in plaintiffs' complaint, or to any part or portion thereof, and that the defendants as against the plaintiffs in this action are the owners in fee, in possession and entitled to the sole and exclusive possession of the same and that the said defendants recover their costs and disbursements.

McGINN & SULLIVAN,
Attorneys for Defendants.

United States of America,
District of Alaska,—ss.

Henry Cook, being first duly sworn, deposes and says: That he is one of the defendants in the above-entitled action; that he has read the foregoing Amended Answer, knows the contents thereof and that the allegations therein contained are true as he verily believes.

HENRY COOK.

Subscribed and sworn to before me this 15th day of October, 1909.

[Notarial Seal]

JOHN L. McGINN,
Notary Public for Alaska.

Service of a true copy of the within Amended Answer is hereby accepted this 15th day of October, 1909.

_____,
Attorneys for the Plaintiffs.

[Endorsed]: Filed Oct. 16, 1909.

[Caption and Title.]

Reply to Amended Answer.

The plaintiffs for a reply to the amended answer as on file allege and state:

I.

That they deny each and every allegation and statement contained in what is called therein a "First further and separate answer and defense," commencing on page 2.

II.

That they deny each and every allegation and statement set forth in said amended answer designated "A further and separate answer and defense," commencing near the bottom of page 3.

III.

That they deny each and every statement as alleged in what is called "A further separate and affirmative answer," commencing at the middle of page 4 of said amended answer.

IV.

Replying to that part of the amended answer commencing near the top of page 5 designated, "A further and separate answer and defense to paragraphs 3 and 4 of the complaint and to the supplemental complaint etc.," plaintiffs say: That they deny all the allegations and statements made in paragraph I on page 5; that they admit the statement made in paragraph 3 and 4 on pages 5 and 6 and paragraph 8 on page 8 with reference to actions pending in this court, one entitled Henry Cook et al. vs. Klonas et al., No. 278, and another Henry Cook et al. vs. Weimer et al., No. 798, in which injunctions were issued and afterwards dissolved; that as to the allegations and statements embodied in said supposed answer and defense to paragraphs 3 and 4 of the complaint to the effect, "that in September, 1908, the defendants Atwell & Riley, Enstrom Brothers and August Peterson in good faith entered upon and mined the ground in controversy under leases from the other defendants E. T. Barnette, John C. Ridenour, Henry Cook, John L. McGinn and M. L. Sullivan under the good faith belief that the last-named defendants were the owners thereof and had the right to lease the said ground to them," these plaintiffs deny each and every one of such allegations and statements, and on the contrary allege that on and prior to September, 1908, and ever since, all the defendants well knew that said mining ground was in the actual, open and visible possession of these plaintiffs under a claim of ownership, and that these plaintiffs were during all the times mentioned in the complaint and ever since have been

the owners of and entitled to the possession thereof, against all persons other than the United States; as to all other allegations and statements contained in paragraph II on page 5 to paragraph XIII on page 11, both included, not hereinbefore specially admitted or denied, they say that they have no knowledge or information sufficient to form a belief as to their truth or falsity, and there*ofr* deny the same.

LOUIS K. PRATT,
R. W. JENNINGS,
Attorneys for Plaintiffs.

United States of America,
Territory of Alaska,—ss.

William Rooney on oath says: I am one of the plaintiffs in the above-entitled action, have read the foregoing reply, am familiar with the contents thereof and the same is true as I verily believe.

WILLIAM ROONEY.

Subscribed and sworn to before me this 18th day of October, 1909.

[Notarial Seal] LOUIS K. PRATT,
Notary Public for Alaska.

Received a copy of the foregoing Reply, this 18th day of October, 1909.

McGINN & SULLIVAN,
Attorneys for Defendants.

[Endorsed]: Filed Oct. 18, 1909.

[Caption and Title.]

Amended Reply [to Amended Answer].

The plaintiffs for reply to the amended answer *of*

file herein allege and state, leave of Court first being had and obtained:

I.

That they deny each and every allegation and statement in what is called therein a "First further and separate answer and defense," commencing on page 2.

II.

That they deny each and every allegation and statement set forth in said amended answer, designated "A further and separate answer and defense," commencing near the bottom of page 3.

III.

That they deny each and every statement as alleged in what is called a further separate and affirmative answer, commencing at the middle of page 4 of said amended answer.

IV.

Replying to that part of the amended answer commencing near the top of page 5, designated "A further and separate answer and defence to paragraphs 3 and 4 of the complaint and to the supplemental complaint," etc., plaintiffs say: That they deny all the allegations and statements made in paragraph I on page 5; that they admit the statement made in paragraphs 3 and 4 on pages 5 and 6 and paragraph 8 on page 8, with reference to actions pending in this court, one entitled Henry Cook *et* al. vs. Klonas et al., No. 278, and another Henry Cook et al. vs. Weimer et al., No. 798, in which injunctions were issued and afterwards dissolved; that as to the allegations and statements embodied in said supposed answer and

defence to paragraphs 3 and 4 of the complaint to the effect "that in September, 1908, the defendants Atwell & Riley, Enstrom Brothers and August Peterson in good faith entered upon and mined the ground in controversy under leases from the other defendants E. T. Barnette, John C. Ridenour, Henry Cook, John L. McGinn and M. L. Sullivan, under the good faith belief that the last-named defendants were the owners thereof and had the right to lease the said ground to them," these plaintiffs deny each and every one of such allegations and statements, and on the contrary allege that on and prior to September, 1908, and ever since, all the defendants well knew that said mining ground was in the actual, open and visible possession of these plaintiffs under a claim of ownership, and that these plaintiffs were during all the times mentioned in the complaint and ever since have been the owners of and entitled to the possession thereof, against all persons other than the United States. As to all other allegations and statements contained in paragraph II on page 5 to paragraph XIII on page 11, both included, not hereinbefore specifically admitted or denied, they say that they have no knowledge or information sufficient to form a belief as to their truth *of* falsity, and therefore deny the same.

V.

And for a further reply to said amended answer the plaintiffs allege as follows:

That they are unable to determine from the first further and separate answer and defence of the defendants herein, or from any other pleading or part

of pleading in this cause, whether or not the ownership of the so-called DOME GROUP location set out in said answer is claimed by the defendants under and by virtue of a purported location thereof made on March 24th, 1905, and recorded in the office of the U. S. Commissioner and ex-officio recorder of the Fairbanks Mining and Recording District, Alaska, on April 17th, 1905, in the notice of location of which A. R. Armstrong, M. E. Armstrong, Henry Cook, J. C. Redenour, A. T. Armstrong, Y. L. Newton, W. R. Sumner and L. T. Selkirk are named as locators;

But if the said claim of ownership is based upon said location or purported location or by mesne conveyances therefrom, then these plaintiffs allege that the said location is and always was null and void, and cannot be made the basis of any claim of ownership for the following reasons, to wit:

1. That the said DOME GROUP LOCATION at all times has been and now is a fraudulent and void location as against the Government of the United States, and as against these plaintiffs and all other persons interested in the ground sought to be embraced therein or covered thereby; that at the time of the alleged location thereof and at all times subsequent, there *was* not eight *bona fide,* individual claimants as locators thereof, nor more than two real and actual individual claimants among the eight alleged locators of said DOME GROUP location, and 160 acres of mineral lands of the United States or thereabouts was illegally and fraudulently included within said alleged Dome Group location by

the defendants Henry Cook, J. C. Ridenour, and E. T. Barnette, for the purpose of surreptitiously acquiring and appropriating to their own use and benefit more mineral land in one location than they were entitled to under the mining laws of the United States;

2. That the names of the said A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk and A. R. Armstrong named and used as locators of said alleged Dome Group location by said Henry Cook, J. C. Ridenour, and E. T. Barnette, were each and all dummies and sham locators, and neither of them ever had or were intended by said Henry Cook, J. C. Ridenour and E. T. Barnette, to have any estate, right, title or interest whatsoever in said alleged Dome Group location;

3. That said Henry Cook, J. C. Ridenour, and E. T. Barnette, wrongfully and unlawfully conspired with each other, at and prior to the date of the alleged location of said Dome Group location to wrongfully and fraudulently make and claim the said location in the manner and way aforesaid, and by the use of the names of the said six sham and dummy locators mentioned, and did attempt to make the same in pursuance of such conspiracy, and have claimed and now claim the said 160 acres more or less of mineral lands referred to in said answer and a portion of which is in controversy herein, as such Dome Group loca-

tion under and by virtue of the said false, fraudulent and illegal location.

LOUIS K. PRATT and
R. W. JENNINGS,
Attorneys for Plaintiffs.

United States of America,
Territory of Alaska,
Fourth Judicial Division,—ss.

William Rooney on oath says: I am one of the plaintiffs in the above-entitled action, have read the foregoing reply, am familiar with the contents thereof, and the same is true as I verily believe.

WILLIAM ROONEY.

Subscribed in my presence and sworn to before me this 22 December, 1909.

[Notarial Seal] LOUIS K. PRATT,
Notary Public for Alaska.

[Endorsed]: Filed Dec. 22, 1909.

[Caption and Title.]

Formation of Trial Jury.

Now, on this 10th day of May, 1910, the above-entitled cause is called for trial, then being present in open court the plaintiffs and their counsel, Louis K. Pratt and R. W. Jennings, and defendants, and their counsel, McGinn & Sullivan;

Both sides announced themselves ready for trial. Thereupon the deputy clerk of Court drew from the jury-box, one at a time, ballots containing the names of the regularly empaneled and qualified trial jurors, and also the names of 24 veniremen, returned by the

U. S. Marshal in response to a writ of special venire, until the jury was complete except as to the exercise of the peremptory challenges. Thereupon the jurors passed for cause were placed in charge*d* of two sworn bailiffs and were admonished and instructed and excused for the day.

Done in open court at Fairbanks, Alaska, this 10th day of May, 1911.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 9, page 971.

[Minutes Re Formation of Trial Jury.]

[Caption and Title.]

Now, on this 11th day of May, 1910, the above-entitled cause was called for a continuation of the trial jury. Then was present in open court the plaintiffs and their counsel, Louis K. Pratt and R. W. Jennings, and the defendants by their counsel, McGinn & Sullivan. A deputy clerk of the court thereupon drew from the trial jury-box, one at a time, the remaining ballots containing the names of 24 veniremen summoned by virtue of a writ of special venire and afterward the ballots containing the names of 15 veniremen, summoned by the U. S. Marshal in response to a writ of special venire, until the jury was complete and satisfactory to plaintiffs and defendants and their counsel. The jury so impaneled and thereupon sworn to well and truly try the cause now at issue, and a true verdict give, according to the

evidence and the law as given to them by the Court was composed of the following persons, to wit:

W. K. Renshaw.	S. B. Waite.
Chas. Ostrom.	W. Gould.
E. T. Townsend.	W. M. Polley.
A. Nerland.	C. H. Pasesills.
C. H. Woodward.	Geo. Gateley.
H. D. Fountain.	O. H. Bernard.

Done in open court, at Fairbanks, Alaska, this 11th day of May, 1910.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 9, page 973.

[Minutes of Trial—May 11–May 27, 1910.]

[Caption and Title.]

Now, on this 11th day of May, 1910, the jury being completed and sworn, in the above-entitled cause was called for trial, then being present in open court the plaintiffs and their counsel, Louis K. Pratt and R. W. Jennings, and the defendants by their counsel, McGinn & Sullivan. Both parties announcing themselves ready for trial, Louis K. Pratt made an opening statement to the jury outlining the evidence plaintiffs expected to introduce upon the trial. John L. McGinn made an opening statement to the jury outlining the evidence the defendants expected to introduce in support of their contentions.

Wm. Rooney was sworn and testified for plaintiffs until the hour for adjournment had arrived, when the jury was admonished and in charge of two sworn bailiffs was dismissed for the day.

Done in open court at Fairbanks, Alaska, this 11th day of May, 1910.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 9, page 973.

[Caption and Title.]

Now, on this 12th day of May, A. D. 1910, the above-entitled cause came on for a continuation of the trial. Then was present in open court the plaintiffs and their counsel, Louis K. Pratt and R. W. Jennings, and defendants by their counsel, McGinn & Sullivan. William Rooney was recalled for cross-examination. Plaintiffs' Exhibits No. 1 and 2 were introduced and filed. Geo. Carr and G. W. Johnson were sworn and testified for plaintiffs until the hour for adjournment had arrived, when the jurors were admonished and in charge of two sworn bailiffs were excused for the day.

Done in open court at Fairbanks, Alaska, this 12th day of May, 1910.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 9, page 974.

[Caption and Title.]

Now, on this 13th day of May, 1910, the above-entitled cause was called for a continuation of the trial before a jury. Then was present in open court the plaintiffs and their counsel, Louis K. Pratt and R. W. Jennings, and the defendants by their counsel, McGinn & Sullivan. The jury heretofore sworn to try the cause appeared in the jury-box. G. W. Johnson was recalled for further cross-examination, De-

fendants' Exhibit "A" was introduced and filed, August Plaschlart, John Junkin and G. A. Carlson were sworn and testified for plaintiffs until the hour for adjournment had arrived, when the jury was admonished and placed in charge of two bailiffs and dismissed for the day.

Done in open court at Fairbanks, Alaska, this 13th day of May, 1910.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 9, page 976.

[Caption and Title.]

Now, on this 14th day of May, 1910, the above-entitled cause came on to be heard upon a continuation of the trial before a jury, then being present in open court the plaintiffs and their counsel, Louis K. Pratt and R. W. Jennings, and defendants by their counsel, McGinn & Sullivan. The jury sworn to try the cause, in charge of two bailiffs, appeared in the jury-box.

Joseph Johnson was sworn and testified for plaintiffs at the conclusion of which the jury was admonished and in charge of two sworn bailiffs was excused until Monday, May 16th, 1910, at 10:00 o'clock A. M.

Thereupon counsel for plaintiffs made an offer to prove that the location of the Dome Group as shown by the testimony already in evidence was void in law and of no effect. Counsel for defendants opposed the offer of plaintiffs' counsel and objected to the introduction of any evidence to sustain the contention of plaintiffs that the Dome Group location as initiated

by plaintiffs is fraudulent and void. In the absence of the jury, arguments of counsel were heard and citations noted, until the hour for recess had arrived, and during an evening session when the matter was by the court taken under advisement.

Done in open court at Fairbanks, Alaska, this 14th day of May, 1910.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 9, page 978.

[Caption and Title.]

Now, on this 16th day of May, 1910, the above-entitled cause came on to be heard upon a continuation of the trial before a jury. Then appeared in open court the plaintiffs and their counsel Louis K. Pratt and R. W. Jennings, and the defendants by their counsel, McGinn & Sullivan. The jury sworn to try the cause in charge of two sworn bailiffs appeared in the jury-box. The Court before the jury came into open court, announced that defendants' objections to the introduction of evidence at the time on the part of plaintiffs prove the location of the Dome Group void in law and of no effect, having been under advisement, would be overruled, to which ruling defendants excepted and the exception was allowed.

The jury being called plaintiffs' counsel thereupon offered and read into the record the so-called admissions made by defendants E. T. Barnette, Henry Cook and J. C. Ridenour as taken in depositions filed as a part of the record in cause No. 278, Cook et al. vs. Klonas. Counsel for defendants offered and read into the record other portions of the same depositions

calculated to explain the so-called admissions read by plaintiffs' counsel. Plaintiffs also read portions of the testimony of E. T. Barnette and J. C. Ridenour contained in cause No. 1510, Circuit Court of Appeals, 9th Circuit, and defendants read other portions of said testimony.

Plaintiffs' Exhibit No. 3 was introduced and filed.

M. R. Hussey was sworn and John Junkin was recalled and testified for plaintiffs until the hour for recess had arrived, when the jury in charge of two sworn bailiffs was excused for the day.

Done in open court at Fairbanks, Alaska, this 16th day of May, 1910.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 9, page 979.

[Caption and Title.]

Now, on this 17th day of May, 1910, the above-entitled cause was called for a continuation of the trial, then being present in open court the plaintiffs and their counsel, Louis K. Pratt and R. W. Jennings, and the defendants by their counsel, McGinn & Sullivan. The jury sworn to try this cause in charge of two sworn bailiffs appeared in the jury-box. Plaintiffs announced that they rested. The jury was thereupon excused from the room while the counsel for defendants made a motion asking for a directed verdict and submitted arguments why a nonsuit should be granted, which motion was overruled and denied and the jury was recalled.

J. C. Ridenour was sworn and testified for defendants until the hour for adjournment had arrived,

when the jury was admonished and excused for the day.

Done in open court at Fairbanks, Alaska, this 17th day of May, 1910.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 10, page 1.

[Caption and Title.]

Now, on this 18th day of May, 1910, the above-entitled cause came on for a continuation of the trial before a jury, then being present in open court the plaintiffs and their counsel, Louis K. Pratt and R. W. Jennings, and defendants by their counsel, McGinn & Sullivan. The jury sworn to try this cause, in charge of two bailiffs duly sworn appeared in the jury-box.

J. C. Ridenour was recalled for cross-examination and Wm. Rooney was called to testify as a witness for defendants. Plaintiffs' Exhibit No. 4 and Defendants' Exhibit "C" were introduced and filed.

Richard Stafford was sworn and testified for defendants until the hour *fo* recess had arrived, when the jury was admonished and in charge of two sworn bailiffs was excused for the day.

Done in open court at Fairbanks, Alaska, this 18th day of May, 1910.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 10, page 2.

[Caption and Title.]

Now, on this 19th day of May, 1910, the above-entitled cause came on for a continuation of the trial

before a jury, then being present in open court the plaintiffs and their counsel, Louis K. Pratt and R. W. Jennings, and the defendants by their counsel McGinn & Sullivan. The jury sworn to try the cause, in charge of two sworn bailiffs appeared in the jury-box.

Richard Stafford was recalled for a continuation of his testimony and for cross-examination. Defendants' Exhibits "D," "E," "F," "G," "H" and "I" were introduced and filed. Geo. Harris and John A. Holmgren were sworn and testified for defendants until the hour for recess had arrived, when the jury was instructed and admonished and in the custody of two sworn bailiffs was excused for the day.

Done in open court at Fairbanks, Alaska, this 19th day of May, 1910.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 10, page 4.

[Caption and Title.]

Now, on this 20th day of May, 1910, the above-entitled cause was called for a continuation of the trial, then being present in open court the plaintiffs and their counsel, Louis K. Pratt and R. W. Jennings, and the defendants by their counsel, McGinn & Sullivan. The jury heretofore sworn to try this cause in charge of two bailiffs regularly sworn, appeared in the jury-box.

John A. Holmgren was recalled and testified for defendants and defendants' Exhibits "J" and "K" were filed. George Friend, R. A. Jackson, Homer Clemmons, R. M. Crawford, and H. J. Miller were

sworn and testified for defendants until the hour for recess had arrived when the jury was admonished and excused for the day.

Done in open court at Fairbanks, Alaska, this 20th day of May, 1911.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 1, page 7.

[Caption and Title.]

Now, on this 21st day of May, 1910, the above-entitled cause came on for a continuation of the trial before a jury, then being present in open court the plaintiffs and their counsel Louis K. Pratt and R. W. Jennings, and defendants and their counsel McGinn & Sullivan. The jury sworn to try this cause in charge of two sworn bailiffs, appeared in the jury-box. H. J. Miller, R. M. Crawford and George Friend were recalled and testified for defendants. Defendants' Exhibit "L," "M" and "N" were introduced and filed. Cyrus Atwell and August Peterson were sworn and testified for defendants until the hour for recess had arrived, when the jury was admonished and in charge of two sworn bailiffs was excused until Monday, May 23d, 1910, at 10:00 o'clock A. M.

Done in open court at Fairbanks, Alaska, this 21st day of May, 1911.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 10, page. 9.

[Caption and Title.]

Now, on this 23d day of May, 1910, the above-entitled cause was called for a continuation of the

trial before a jury, then being present in open court the plaintiffs and their counsel, Louis K. Pratt and R. W. Jennings, and defendants by their counsel, McGinn & Sullivan. The jury heretofore sworn to try this cause in charge of two sworn bailiffs appeared in the jury-box. Defendants' Exhibit "O" was introduced and filed.

L. S. Robe, John Ronan, J. E. Riley, U. G. Hastings, Henry Cook, Walter King, Leroy Tozier, M. L. Sullivan and John L. McGinn were sworn and testified for defendants. Defendants rest.

The deposition of David Johnson taken in this cause was introduced in evidence by plaintiffs and was read to the jury until the hour for recess had arrived, when the jury was admonished and in charge of two sworn bailiffs was dismissed for the day.

Done in open court at Fairbanks, Alaska, this 23d day of May, 1910.

THOMAS R. LYONS.

Entered in Court Journal No. 10, page 11.

[Caption and Title.]

Now, on this 24th day of May, 1910, the above-entitled cause came on for a continuation of the trial before a jury, then being present in open court the plaintiff and their counsel Louis K. Pratt and R. W. Jennings, and defendants by their counsel, McGinn & Sullivan. The jury sworn to try this cause, in charge of two sworn bailiffs, appeared in the jury-box. Plaintiffs' Exhibit No. 5 was introduced and filed. Tobias Perry, Andrew Ness, Chas. Knutson, Ronald Morrison, George Harris and R. J. Patterson were sworn and testified for plaintiffs in rebuttal.

The second amended and supplemental complaint in Cause No. 278, Cook et al. vs. Klonas et al., and the affidavits of David Yarnell, Geo. Chapman, Henry Broome, and Henry Cook filed in cause No. 298, Henry Cook vs. Weimer & Ness, were offered in evidence and read to the jury and into the record over the objection of defendants, which objection was overruled and an exception allowed.

The hour for recess having arrived, the jury was admonished and in charge of two sworn bailiffs was excused for the day.

Done in open court at Fairbanks, Alaska, this 24th day of May, 1910.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 10, page 13.

[Caption and Title.]

Now, on this 25th day of May, 1910, the above-entitled cause came on for a continuation of the trial before a jury, then appearing in open court the plaintiffs and their counsel, Louis K. Pratt and R. W. Jennings, and the defendants by their counsel, McGinn & Sullivan. The jury sworn to try this cause appeared in the jury-box in charge of two sworn bailiffs.

Affidavits of Henry Cook, filed in cause No. 797, and J. A. Pounder, filed in cause No. 278, were by plaintiffs' counsel read to the jury and into the record. The order of nonsuit filed in cause No. 927 and the Answer of Richard Stafford filed in cause No. 278 were also by plaintiffs' counsel read to the jury and into the record. Theodore Olson was sworn and testified for plaintiffs in rebuttal and Geo. Carr, Wm.

Rooney, August Plaschlart and G. W. Johnson were recalled and testified for plaintiffs in rebuttal. Both sides rest.

Thereupon the jury was admonished and excused for the day and arguments of both counsel upon requested instructions were heard until the hour for recess had arrived, and during an evening session.

Done in open court at Fairbanks, Alaska, this 25th day of May, 1910.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 10, page 16.

[Caption and Title.]

Now, on this 26th day of May, 1910, the above-entitled cause came on for a continuation of the trial before a jury, then being present in open court the plaintiffs and their counsel, Louis K. Pratt and R. W. Jennings, and defendants by their counsel, McGinn & Sullivan. The jury sworn to try this cause in charge of two sworn bailiffs appeared in the jury-box.

The jury was excused from the room while counsel for defendants made a motion for a directed verdict in favor of defendants, which motion was overruled and an exception allowed.

The jury was thereupon recalled to the jury-box and R. W. Jennings, of counsel for plaintiffs, addressed the jury, reviewing the evidence from the standpoint of plaintiffs.

John L. McGinn, of counsel for defendants, then addressed the jury, reviewing the evidence from the standpoint of the defendants until the hour for re-

cess had arrived, when the jury was admonished and dismissed for the day.

Done in open court at Fairbanks, Alaska, this 26th day of May, 1910.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 10, page 17.

[Caption and Title.]

Now, on this 27th day of May, 1910, the above-entitled cause came on for a continuation of the trial before a jury, then being present in open court the plaintiffs and their counsel, Louis K. Pratt and R. W. Jennings, and defendants and their counsel, McGinn & Sullivan. The jury sworn to try this cause, in charge of two sworn bailiffs, appeared in the jury-box. John L. McGinn, of counsel for defendants, concluded his address to the jury. Louis K. Pratt, of counsel for plaintiffs, made an argument to the jury in behalf of plaintiffs from 10:00 A. M. until 3 P. M.

Thereupon the Court read his instructions to the jury, and handed to them a typewritten copy of the same, together with the pleadings and exhibits in the case and two blank forms of verdict. In charge of two sworn bailiffs the jury thereupon at 3:30 P. M. retired to deliberate upon its verdict.

Done in open court at Fairbanks, Alaska, this 27th day of May, 1910.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 10, page 18.

[Caption and Title.]

Now, on this 27th day of May, 1910, at 7:35 P. M., comes into open court the jury heretofore sworn to try the above-entitled cayse, and each juror from the jury-box answers to his name as the roll is called. Then is present in open court the plaintiffs and their counsel, Louis K. Pratt and R. W. Jennings, and counsel for the defendants, McGinn & Sullivan.

Having announced to the Court that they have agreed upon a verdict and being required so to do, the verdict of the jury is rendered to the Court, and being such as can be received by the Court, the verdict is read in open court and in the presence of the jury and is ordered to be filed.

The verdict so received, accepted, read and filed was in words and figures as follows, to wit:

[Caption and Title.]

Verdict.

We, the jury duly sword and impaneled in the above-entitled cause, find in favor of the defendants and against the plaintiffs, and find that the plaintiffs are not entitled to the possession of the property described in the complaint or any part thereof, and that the defendants are as against the plaintiffs herein the owners in fee and entitled to the possession of the whole of said property described in the complaint in this action and which is known and designated therein as Bench Claim Number Three, first tier, right limit, Dome Creek.

O. H. BERNARD,
Foreman.

Done in open Court at Fairbanks, Alaska, this 27th day of May, 1910.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 10, page 19.

[Caption and Title.]

Order Denying Motion for New Trial and for Particular Judgment.

Now, on this 2d day of June, 1910, in open court, at 8:00 o'clock P. M., comes on to be heard plaintiffs' motion for a particular judgment and for a new trial in the above-entitled cause. Then appeared Louis K. Pratt and R. W. Jennings, counsel for plaintiffs, and John L. McGinn, counsel for defendants. Arguments of R. W. Jennings and Louis K. Pratt, of counsel for plaintiffs, were heard and citations read and noted until the Court was well advised. Thereupon the Court delivered an oral opinion, reviewing the testimony given at the trial and the arguments submitted on the motion under consideration, at the conclusion of which:

IT IS ORDERED: That plaintiffs' motion for a new trial and for a particular judgment be and the same are now each hereby overruled and denied, and that four months from date be allowed for settling and filing a bill of exceptions. To which ruling plaintiffs except and the exception is allowed.

Done in open court at Fairbanks, Alaska, this 2d day of June, 1910.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 10, page 36.

[Caption and Title.]

Judgment.

BE IT REMEMBERED that upon the tenth day of May, 1910, came on regularly for trial the above-entitled cause before the Honorable Thomas R. Lyons, Judge of the above-entitled court; the plaintiffs appearing by their attorneys, Louis K. Pratt and R. W. Jennings, and the defendants appearing by their attorneys, John L. McGinn and M. L. Sullivan. A jury of twelve men having been duly sworn and empaneled, the plaintiffs introduced evidence in support of the allegations of their complaint, and the plaintiffs having closed, the defendants introduced evidence in opposition thereto; the plaintiffs then introduced evidence in rebuttal of the testimony of the defendants. And all evidence being closed, the case was argued to the jury by respective counsel for the plaintiffs and defendants; and the Court then instructed the jury as to the law of the case; thereupon the jury retired to deliberate of their verdict, and thereafter and upon the 27th day of May, 1910, returned into Court a verdict signed by their foreman, wherein and whereby they found in favor of the defendants and against the plaintiffs, and found that the defendants, as against the plaintiffs, were the

owners in fee and entitled to the sole and exclusive possession of the property mentioned and described in the complaint and answer in this cause, and which is known and designated as placer claim number three (3) below discovery, first tier, right limit, of Dome Creek, in the Fairbanks Recording District, Territory of Alaska, said property being approximately 660 feet in width by 1320 feet in length, and which adjoins on the east and lies alongside of creek placer claim No. 3 below discovery upon said Dome Creek, said property being marked upon the ground by means of stakes and monuments so that the boundaries thereof can be readily traced.

That within three days thereafter, the plaintiffs filed a motion for a new trial, which said motion for new trial came on regularly for hearing before the Court, and, after a full argument by the attorneys and after due consideration by the Court, was by the Court denied.

Now, therefore, by virtue of the foregoing and the verdict of the jury in this case rendered,

IT IS ORDERED, ADJUDGED AND DECREED that the defendants are now and at the time of the institution of this action and prior thereto were the owners in fee and entitled to the sole and exclusive possession of the property mentioned and described in the complaint, and which has been hereinbefore described and which is known as No. 3 below discovery, first tier, right limit of Dome Creek.

That the estate of the defendants in and to said property as to all persons save and except the United States of America is an estate in fee, and that the

defendants are entitled to the sole and exclusive possession thereof.

That the plaintiffs have no estate, right, title or interest in or to said property or to any part or portion thereof, nor are said plaintiffs or any of them entitled to the possession of any part or portion of said property.

That the defendants are entitled to recover as against the plaintiffs their costs and disbursements herein.

Dated at Fairbanks, Alaska, July 2d, 1910.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 10, page 95.

[Endorsed]: Filed July 2, 1910.

Done in Chambers this 31st day of December, 1910, at Fairbanks, Alaska.

PETER D. OVERFIELD,
District Judge.

Entered in Court Journal No. 10, page 629.

[Caption and Title.]

Order [Extending Time to June 2, 1911, to File Bill of Exceptions].

Now, on this day, this matter coming on for hearing on motion of appellants for a further extension of time within which to prepare, file and forward Bill of Exceptions herein from Fairbanks to Juneau, Alaska, and for the settlement of the same, and the Court being fully advised in the premises.

IT IS, THEREFORE, CONSIDERED, OR-

DERED AND ADJUDGED, that the time for the filing, presenting and forwarding of said Bill of Exceptions to Juneau and the settling of the same be, and the same is hereby, extended to the second day of June, 1911.

Done in open court this 1st day of March, 1911.

THOMAS R. LYONS,
Judge of the District Court.

Done in open court at Fairbanks, Alaska, this 31st day of March, 1911.

PETER D. OVERFIELD,
District Judge.

Entered in Court Journal No. 11, page 24.

[Caption and Title.]

Order [Extending Time to December 2, 1910, to File Complete Bill of Exceptions].

On motion of the plaintiffs, supported by affidavit, and for good cause shown in said motion and affidavit;

IT IS ORDERED: That the time to complete and present for certification the bill of exceptions on behalf of the plaintiffs in this cause is hereby extended from October 2d, 1910, the date fixed by Honorable Thomas R. Lyons, the trial Judge, to the second day of December, 1910.

Done in open court at Fairbanks, Alaska, this 9th day of September, 1910.

PETER D. OVERFIELD,
District Judge.

Entered in Court Journel No. 10, page 270.

[Order Extending Time to March 2, 1911, to File Bill of Exceptions.]

[Caption and Title.]

Now, on this day, this matter coming on for hearing on motion of plaintiffs for an extension of time within which to prepare, present and file a bill of exceptions herein, and the Court being fully advised in the premises;

IT IS, THEREFORE, ORDERED: That the time within which to prepare, present and file a bill of exceptions herein be, and the same is hereby, extended until the second day of March, 1911.

Done in open court the 1st day of December, 1910.

THOMAS R. LYONS,
Judge of the District Court.

Clerk's Note: Received for filing and entering this 31st day of December, 1910.

[Caption and Title.]

Order to Transmit Exhibits.

Now, on this 4th day of July, 1910, in open court, on oral motion of Louis K. Pratt, counsel for plaintiffs:

IT IS ORDERED: That the Clerk of this Court transmit with the record on appeal in the above-entitled cause to the 9th Circuit Court of Appeals, Plaintiffs' Exhibits 2, 4 and 5, and Defendants' Exhibits "J" and "K," and that after the hearing by

the said Circuit Court of Appeals, the Clerk of said Court return the said Exhibits to the Clerk of this Court along with the mandate of said Circuit Court of Appeals.

Done in open court, at Fairbanks, Alaska, this 4th day of July, 1910.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 10, page 98.

[Caption and Title.]

Bill of Exceptions.

BE IT REMEMBERED that thereafter, and on the tenth day of May, one thousand nine hundred ten, at the hour of ten o'clock A. M., the parties appearing personally and by their counsel, the plaintiffs, William Rooney, August Plaschlart, John Junkin and G. W. Johnson, and by their counsel, Louis K. Pratt, Esq., and Robert W. Jennings, Esq., and the defendants, E. T. Barnette, Henry Cook, J. C. Ridenour, John L. McGinn and M. L. Sullivan, and by their counsel, John L. McGinn and M. L. Sullivan, and the Court having inquired of counsel if the parties are ready to proceed with the trial, they respectively announced in open court that they were:

[Proceedings Had on Formation of Jury.]

Whereupon the following proceedings were had, to wit:

By the COURT.—Shake the box and call a juror, Mr. Clerk.

Eleven men were then regularly called, one by one, as jurymen, and having duly qualified on *voir dire* took their seats in the jury-box; whereupon the Clerk drew the name of John Derby, said John Derby being examined as to his qualifications testified on *voir dire* as follows:

[Examination of John Derby.]

By Mr. McGINN.—Mr. Derby, you heard the statement that has been made of this case?

A. Yes, sir.

Q. Do you know anything about it?

A. No, I do not.

Q. How long have you resided here, Mr. Derby?

A. Well, on and off this last five years.

Q. Where have you resided?

A. Outside points; I have been in here every season. I come in here during every navigating season, though I was in here one winter steadily, the winter of 1905 and '06 is the only winter I remained.

Q. Have you followed mining?

A. No, I have not.

Q. What business do you follow?

A. Steamboating, principally.

Cross-examination.

By Mr. PRATT.—You've been up here how long?

A. About six years.

Q. Where did you come from here?

A. San Francisco.

Q. How long have you resided there?

A. Since 1875.

Q. You have been coming up here summers for some years.

(Examination of John Derby.)

A. Summers for the last six years, well five years; I didn't come in the year before last.

Q. What capacity did you come up here in?

A. I'm purser on a boat.

Q. What boat?

A. Well, various ones; I was on the "Louise" last year, on the Yukon.

Q. What boat are you with this season?

A. I don't know which boat I will be assigned to yet, not until navigation opens.

Q. You will be assigned, I suppose, to some of these boats that wintered down below Chena?

A. Well, either one of those or some one of them on the Yukon River.

Q. When do you expect to start in your suties as purser? A. Well, as soon as navigation opens.

Q. When will that be?

A. When the ice goes out.

Q. Within the next ten days?

A. It looks so now.

Q. You consider Alaska your place of residence?

A. No, I do not; merely here temporarily.

Plaintiffs challenge for cause.

Defendants resist challenge.

The COURT.—Do you care to interrogate him any further, Mr. McGinn? You're an inhabitant of the District of Alaska?

A. At the present time I am, yes, sir.

Q. And will be here six or seven months?

A. Yes, in Alaska, yes.

Q. And will be here next year?

(Examination of John Derby.)

A. I presume so.

Q. And you go out and spend the winters in San Francisco? A. Yes, sir, outside.

Q. Your work is all done here, isn't it?

A. My work is all done here.

Q. And you spend the winters *out ide* and come in over the ice in the spring?

A. Well, sometimes over the ice and sometimes by way of St. Michaels.

Q. And you're under an Alaska salary, that is, while you're out here? A. Yes, sir, yearly salary.

Mr. McGINN.—I would like to interrogate this witness further: How long have you been coming to Alaska, Mr. Derby? A. Since 1904.

Q. How many months did you spend in Alaska in 1904? A. I think it was five months.

Q. What time did you come here in 1904?

A. I arrived here about the first week of June.

Q. And when did you go out?

A. About the middle of October.

Q. When did you then return?

A. I came back in the following June, that year.

Q. June of 1905? A. Yes, sir.

Q. How long did you stay here in Alaska that year? A. Well, I stayed here that winter then.

Q. Stayed here the winter of 1905 and 6?

A. Yes, sir.

Q. And didn't go out until the fall of 1907?

A. No, the fall of 1906.

Q. Yes, the fall of 1906; then you returned in June the spring of 1907?

(Examination of John Derby.)

A. Yes, I came to Alaska in 1907.

Q. You came over the ice?

A. In 1907 by way of Dawson from Skaguay and by way of Lake LaBarge and Dawson—in 1907.

Q. How long did you stay here that year?

A. I was here until the following October.

Q. And then when did you return?

A. I didn't come in in 1908; I came in last year in June.

Q. June? A. Yes.

Q. And how long did you stay here last year?

A. I have been here ever since; I have been in Valdez all winter.

Q. Have you been out of Alaska for a year?

A. No, about eleven months.

Q. Do you regard yourself as a resident of the District of Alaska?

A. Well, while I'm here I do.

Q. Yes, sir. As a matter of fact, you spend the greater part of your time in Alaska?

A. Yes, sir, I do, seven or eight months of the year.

Q. And do all of your work in Alaska?

A. Yes, sir.

Q. Now, isn't it true that during the winter months your business is shut down on account of the ice?

A. Yes.

Q. There isn't any necessity of your staying here, and you go away to spend the winters?

A. I go home, yes, sir.

Q. To San Francisco?

A. Yes, sir, that vicinity.

(Examination of John Derby.)

The COURT.—I think this man is an inhabitant under the laws of Alaska. I think he is different than a mere sojourner, he spends his time and does his business here. Even if the law was passed for the purpose you contend for Mr. Pratt, I think it complies with that. The challenge is denied.

Plaintiffs except.

The COURT.—Take a seat in the box, Mr. Derby.

By Mr. PRATT.—Before proceeding further, I desire to propound some further questions of one of the jurors who was brought on suddenly last night.

The COURT.—Very well.

Mr. Derby, you testified you lived in San Francisco? A. Yes, sir.

Q. Do you own a home there? A. No, sir.

Q. Have you got—when you call that your home, you make your home with some relatives or friends?

A. Yes, have folks down there.

Q. Your relatives? A. Yes, sir.

Q. Have you a furnished room in the house there that you consider your own when you're there, for your exclusive use?

A. Well, I stop at the hotel principally there, and with my folks at times; but I don't stay in San Francisco all the time. Still I call it my home and headquarters outside.

Q. Where do you vote?

A. I haven't voted outside for a number of years; I haven't been there sufficient time to gain a vote.

Q. Do you vote in Alaska? A. Yes, sir.

Q. Where? A. Here in this town.

(Examination of John Derby.)

Q. When did you vote here?

A. The winter of 1905–6.

Q. In 1905 and 1906?

A. Yes, sir, stayed in that winter.

Q. You've never voted here since?

A. Not since, no.

Q. What are your purposes, Mr. Derby; when the open season closes here, where do you intend to go?

A. Well, that depends on orders from the company; sometimes I am retained here and sometimes I go outside.

Q. Unless you get orders from the company, it is your purpose to return home to San Francisco, is it?

A. As a rule, yes, sir; and spend the winter out there, until the following season.

Q. In the absence of positive orders from your employer, it is always your purpose to, when the open season is closed here and your duties as purser at an end, to return to your home in San Francisco, isn't it? A. Generally, yes, sir.

Q. Sir? A. As a rule, yes, sir.

Q. Well, isn't it your purpose, generally?

A. Well, yes.

Q. You regard that as your home, don't you?

A. I do.

Q. And place of residence?

A. For the winter, yes, sir, I do.

Q. How long have you lived there, in California?

A. Since 1875.

Q. And you have been making these visits up here in the summer time since 1905—is that it?

(Examination of John Derby.)

A. 1904.

Q. 1904? A. Yes, sir.

Q. And you have spent now two winters during that time, have you, in Alaska?

A. In Alaska, yes.

Q. This winter was one?

A. This winter was one, and three years or four years ago the other.

Q. Now, Mr. Derby, there is one year since 1905 that you didn't come to Alaska at all, was there?

A. That was two years ago.

Q. 1908? A. 1908, yes, sir.

Q. Where were you during that year?

A. I was at home then.

Q. San Francisco?

A. There, and down at San Jose, below San Francisco.

Q. Did you vote that fall? A. No, I did not.

Q. Neither in the State or National, or—

A. No, sir, not at all.

Q. Or city election?

A. I wasn't on the register at all.

Mr. PRATT.—If the Court please, this matter came up under such circumstances that we had no chance to show the Court what we could have shown very readily, and we would ask to be allowed to do that at this time briefly—

The COURT.—I am convinced as to this matter; I have read those cases and inquired of the witness, and from what he states he is an inhabitant of Alaska; he votes here, and he goes out of Alaska the

(Examination of John Derby.)

same as many other men in this country—and all of his work is here. You needn't continue any further.

Plaintiffs except.

There being then in the jury-box twelve men, each of whom had either then passed for cause or adjudged by the Court to be qualified, peremptory challenges were then proceeded with as follows:

Defendant challenged Mr. Bently; whereupon Mr. Bentley's place was filled.

Plaintiffs then challenged Mr. Protzman; whereupon Mr. Protzman's place was filled.

Defendants waived their second challenge.

Plaintiffs then challenged Mr. McGrew; whereupon Mr. McGrew's place was filled.

Defendants waived their third challenge.

Plaintiffs then challenged the said Mr. Derby; whereupon Mr. Derby's place was filled by one O. H. Bernard, whose *voir dire* was as follows:

[Examination of O. H. Bernard.]

By Mr. McGINN.—Mr. Bernard, do you know anything about this case?

A. I know something about it; yes.

Q. You have heard the case discussed, have you?

A. Yes, pro and con.

Q. You have resided here in Fairbanks for five years, have you not, Mr. Bernard? A. Yes, sir.

Q. Engaged in mining? A. Somewhat, yes, sir.

Q. On Cripple Creek and on Gold Hill?

A. Yes, sir.

Q. And have you ever had any property in litigation here? A. Sir?

(Examination of O. H. Bernard.)

Q. Have you ever had any property in litigation in this court?

A. Well, no, we never had a case before the court; we had some trouble over some of our property, and settled it through a compromise.

Q. Through compromise. That was just a conflict of boundary lines, wasn't it?

A. Well, no, it wasn't exactly a boundary line; some parties we presumed jumped some of our ground.

Q. Do you know anything about the real merits of this case?

A. No, I do not, any further than what I have read in the papers.

Q. Well, now, from what you read in the papers and what you heard have you formed or expressed an opinion as to the merits of this case?

A. No, I haven't.

Q. So you have no opinion as to the case at this time—as to the merits of it? A. No, sir.

Q. You never discussed the case with any person purporting to be acquainted with the facts?

A. No, not anybody that knew the facts, any more than the local discussion here last winter in various different places where the case wad discussed more or less—the time it was on trial that time.

Q. And you say that made no impression on you at that time?

A. No, I didn't hear the evidence; just simply the local discussions pro and con.

Q. Are you acquainted with the plaintiffs in this

(Examination of O. H. Bernard.)

case, William Rooney and John Junkin—

A. No, I'm not.

Q. Gus Plaschlart, George Johnson—

A. No, sir.

Q. Are you acquainted with any of the defendants, E. T. Barnette? A. Yes, sir.

Q. Henry Cook? A. No, sir.

Q. J. C. Redenour?

A. I'm slightly acquainted with Mr. Ridenour.

Q. How is that?

A. I'm slightly acquainted with him.

Q. Mr. Sullivan? A. Yes, sir.

Q. Myself? A. Yes, sir.

Q. Is there anything in the nature of your acquaintanceship with any of these defendants that would prevent you from being a fair and impartial juror in this case? A. No, sir.

Q. Have you any fixed opinion as to—(withdrawn). Have you any prejudice against association locations? A. No, sir.

Q. Have you any prejudice against the location of association claims by an agent? A. No, sir.

Q. Have you any fixed opinion as to what constitutes a discovery?

A. Well, yes, I have got an opinion as to what constitutes a discovery.

Q. Now, have you any opinion as to where a man must make a discovery?

A. No; not any further than that he must make his discovery on the ground he expects to operate or hold.

Q. I'll ask you, if you are accepted and sworn as

(Examination of O. H. Bernard.)

a juror in this case, if you could follow the Court's instructions as to what the law is in regard to discovery? A. Yes, sir.

Q. Now, suppose that the Court's instructions as to what the law is might differ from your opinion: Would you follow the Court's instructions or your own opinion?

A. I would follow the Court's instructions on what the law read, on what a discovery should be made—that is, if the Court—the Court naturally instructs according to law.

Q. And you would follow it?

A. Yes, sir, I would follow it.

Q. You feel as though you could do that?

A. Certainly.

Q. Now, Mr. Bernard, do you know of any reason yourself why you could not be a fair and impartial juror in this case? A. No, I do not.

Q. Do you feel, if you were selected as a juror, you could try this case solely and exclusive on the law, and the evidence as you shall hear it here, and not allow any other matters to influence you at all?

A. Yes, sir.

Defendants pass for cause.

Cross-examination.

By Mr. PRATT.—You have lived here four or five years?

A. Yes, sir; I came in in the spring of 1906.

Q. Have been mining, I believe, ever since?

A. No, not ever since; I have mined for the first year and a half, pretty near two years I have, here.

(Examination of O. H. Bernard.)

Q. Since that?

A. Since that I have given the assessment out, and lays; I have done a little work, assessment work and work of that kind, but no actual mining in the last two years.

Q. Well, has your experience here during that time all of the experience you have ever had in your life in mining?

A. No, I had experience before I came to this country.

Q. Where? A. Southeastern Alaska.

Q. Placer or quartz? A. Quartz.

Q. You never mined any in the Nome country?

A. No, I did not.

Q. Did you ever stake and record and discover placer gold?

A. I did on the property we are owning now.

Q. On what creek? A. Cripple Creek.

Q. Well, in connection with that, and in connection with your experience here, I presume you have had occasion to think seriously of the question of the mining laws of the United States as applied to placer mines? A. Certainly.

Q. And the manner of locating them?

A. Yes, sir.

Q. Discovering gold, and so forth? A. Yes, sir.

Q. Have you been on juries that involved those questions? A. I have not.

Q. Well, do you feel that you have a pretty clearly defined opinion of your own as to what it takes to constitute a discovery of gold?

(Examination of O. H. Bernard.)

A. Yes, sir, I have an opinion as to what constitutes a discovery of gold on placer claims.

Q. I believe you say you have only located one claim yourself?

A. No, we have located several claims; I located some ground on Cripple Creek; located some ground on Goldstream, and on Little Nugget; I have located considerable ground, the first year I was here I made several locations.

Q. Had anything to do with association locations?

A. They were all association claims, with the exception of the ground on Little Nugget.

Q. Have you ever been associated in mining operations with any of these defendants? A. No, sir.

Q. Not in any respect? A. Not in any manner.

Q. You spoke of having some litigation, or at least some controversy; did that get into the hands of the attorneys?

A. No, we settled it outside of the courts.

Q. You haven't been involved into any mining litigation since you have been here?

A. No, not within the last three years. We had trouble about three years ago over a lay we had out, and cancelled.

Q. Did that result in litigation?

A. No, it didn't result in much—the parties served an injunction.

Q. Who was your attorney in that matter?

A. Mr. McGinn was our attorney at that time.

Q. Is he your attorney at this time? A. No, sir.

Q. You have no litigation or legal controversy on

(Examination of O. H. Bernard.)

hand that requires the aid of an attorney?

A. Nothing of the kind, no, sir.

Q. Now, in your banking business Mr. Bernard, where do you deposit?

A. I have banked since I have been here with the First National.

Q. Still have your deposit there?

A. I have a small deposit there, yes, sir.

Q. Are you in anywise beholden to them or indebted to them? A. No, sir.

Q. They have no obligations of yours outstanding lien against you or your property? A. No, sir.

Q. So far as any social or business or financial entanglements then that men may and do sometimes have—as far as all those matters are concerned, there is nothing existing between yourself or any of these three banks or these defendants that would in any manner interfere with your duties as a juror?

A. Nothing whatever.

Q. You have heard this case discussed somewhat?

A. Yes, sir.

Q. But the discussions have been so general you don't feel that you have an opinion on the merits?

A. No, I don't generally come into the courtroom; and what I have known about the case is what I have heard on the streets and read in the papers.

Q. And you feel now that you could give the case and render as fair a verdict as if you heard nothing about it? A. I think I could, yes.

Q. Sir? A. I think I could, yes, sir.

Plaintiffs pass for cause.

THE COURT.—The peremptory challenges are exhausted. Swaer the jury to try the cause Mr. Clerk.

Whereupon, the panel being complete the jury was sworn to try the cause and the trial proceeded as follows:

[Evidence Introduced by Plaintiffs.]

Whereupon the following evidence was introduced and proceedings had:

PLAINTIFFS introduced evidence proving

1. That, on the 21st day of September, 1905, the plaintiff William Rooney, and his soplaintiffs G. W. Johnson and August Plaschlart, staked the claim in controversy, to wit: Number three below discovery, first tier, right limit of Dome Creek, in Fairbanks Recording District of Alaska, by running and blazing lines, posting notices, and otherwise marking the claim upon the ground so that its boundaries could be readily traced;

2. That plaintiffs immediately went upon said claim built a cabin thereon, and began living therein, commenced sinking a prospect shaft, and otherwise exploring for gold within the limits of said claim as staked by them; that they diligently continued work on said shaft, etc., until they got to bedrock one hundred and seventy-two (172) feet below the surface; that the shaft was about 150 feet from the upper end line of the claim, and about 180 feet from the easterly side line thereof; that the cabin was about 250 to 300 feet down towards the center of the claim, and that they have lived in said cabin ever since; that in digging their shaft they went through 90 feet of

muck, then through 25 feet of gravel, at which depth they found colors; that about Christmas 1905 they reached bedrock on said claim and there got gold, from three to five cents to the pan; that such discovery of gold by plaintiffs was sufficient to justify an ordinarily prudent man, not necessarily a skilled miner, in the further expenditure of his time and money in developing said claim in the hope and expectation of finding gold in paying quantities.

3. That on the thirteenth day of October, 1905, plaintiffs filed for record in the office of the U. S. Commissioner and ex-officio Recorder of the Fairbanks Recording District, notice of location of said claim as follows:

"NOTICE OF LOCATION.

NOTICE IS HEREBY GIVEN that the undersigned has located twenty acres of placer mining ground, situate in the Fairbanks Mining District of Alaska. On Dome Creek tributary of Chatanika River, to be known as bench claim on right limit and adjoining Creek Claim No. 3 Below Discovery on Dome Creek, described as follows, to wit:

Extending from initial stake 1320 feet downstream to lower end center stake, and 330 feet on each side of center line, marked on the ground by two end center stakes and four corner stakes.

Located September 21st, 1905.

W. ROONEY, Locator.

WITNESS: A. PLASCHLART."

4. That the title of the locator Rooney was, at the time of filing the complaint and at the time of trial, and had been since long prior to the fall of 1908,

vested in all the plaintiffs herein.

5. That until September, 1907, at which time they were enjoined, plaintiffs continued working on the ground, running tunnels, drifts, open cuts, sinking shafts, and otherwise prospecting, developing and mining said claim.

6. That in the fall of 1908 and thereafter continuously until the time of trial, one Riley & Atwell, Enstrom Brothers, and August Peterson, under and by virtue of leases from the defendants Cook, Ridenour, Barnette, McGinn & Sullivan, with a large force of men and machinery and, against the protest of the plaintiffs, deprived plaintiffs of the possession of practically all of said claim save and except the cabin in which they resided thereon, and worked out all the valuable portion of said claim.

7. That the said leases under which said acts of Enstrom Brothers, Riley & Atwell and Peterson were done, reserved to the said defendants as royalty or rent a certain proportion of the value of the gross amount of gold extracted by said lessees—and that under said leases, said lessees extracted from said claim and paid over to said defendants as rent or royalty, gold-dust of the total value of Sixty-seven Thousand Six Hundred and Ten Dollars ($67,-*061*.00). The total value of gold-dust extracted by the lessees from the ground in controversy for the same period *for the said period* was $263,719.00.

8. That at the time they staked said claim No. 3, plaintiffs saw a dump or shaft debris near Ridenour's tent on number four, near the line of said No. 3; that at that time they knew that said claim

No. 3 was within the boundaries of the land claimed to have been staked by the Dome Group Association, but that "they did not believe that said association claim was valid in law for the reason that, as they understood, it was located through the use of 'dummies' and because they believed at that time that a discovery had to be made on each twenty acres of an association claim."

9. There was evidence that at and prior to the time plaintiffs located said ground and went to living and working upon it, no shaft had been sunk thereon or work of any kind thereon had been done by any one; and that there was no one living on said claim at said time; that at that time, there was a tent on No. 4 close by the boundary line of said claim No. 3, which tent was occupied by defendant J. C. Ridenour, who came out of the tent, and that plaintiffs then asked said Ridenour "if there was any work done on No. 3," to which he replied, "No, there is nothing done," and that plaintiffs then said: "Then this ground is open we are going to stake it," to which Ridenour replied, "Go ahead and stake it, but it is a portion of the Dome Group." That one of the plaintiffs then said: "Who owns the Dome Group?" To which Ridenour replied: "I own an interest, Cook owns an interest, and Captain Barnette and others own an interest," and that Ridenour further said: "Go ahead and stake it if you want, but you couldn't hold it if you had Rockefeller's wealth."

Mr. JENNINGS.—Mr. Clerk, I wish you would get the deposition of Henry Cook in Cause No. 278 and the deposition of E. T. Barnette in Cause No.

278—they are in packages No. 4 and 5 (to bailiff). (After securing which.) Perhaps we can save time if counsel will admit that is Captain Barnette's signature there, and that it is his deposition as taken in No. 278 Cook vs. Klonas.

Mr. McGINN.—I don't think there is any question about that being his deposition—that's his signature.

Mr. JENNINGS.—And you admit that the deposition was taken in No. 278, Cook et al. vs. Klonos, involving the Dome Group Claim.

Mr. McGINN.—We admit just what it shows.

Mr. JENNINGS.—I don't propose to offer the whole of the deposition. We offer it for the purpose of showing admissions made by E. T. Barnette—I don't offer the whole deposition at all.

Mr. JENNINGS.—I will state to the Court that we propose to follow it up with other testimony that will overcome any such objection.

Objected to upon the ground that it isn't binding upon the defendants in this case Henry Cook, J. C. Ridenour, M. L. Sullivan and John L. McGinn.

Mr. McGINN.—We object furthermore upon the ground that it is not shown that E. T. Barnette was the agent of the Dome Group outside of Cook and Ridenour; that these declarations were made long subsequent to the time of the location of the Dome Group and the perfecting of the claim and discovery of gold thereon, and it is not shown that he had any authority by his declarations or deposition to bind any of those other parties.

Mr. JENNINGS.—We propose to connect it later, your Honor.

Objection overruled. Exception.

[Excerpts from Deposition of E. T. Barnette in Case No. 1510 U. S. C. C. A. (Read by Mr. Jennings).]

(Mr. Jennings, reading deposition of E. T. Barnette.)

"By Mr. COUSBY.—Your name is E. T. Barnette?

A. Yes, sir.

Q. You live at Fairbanks, Alaska?

A. I do. * * *

Q. Are you acquainted with that property on Dome Creek known as the Dome Group?

A. I know there is such a group.

Q. Situated in the Fairbanks Recording District, in this Territory? A. Yes, sir.

Q. Whereabouts is that claim?

A. It is below discovery on the right limit, Dome.

Q. Do you know what claims below discovery on that creek it is opposite to or adjoining?

A. I know about.

Q. Just state as near as you can tell?

A. It is One, Two, Three, Four and, I believe, a part of Five on the right limit.

Q. Is there any understanding or agreement of any kind between you and any persons whomsoever to the effect that you were to have any estate, right, title, or interest whatever in the Dome Group claim situate on the right limit of Dome Creek below discovery in the Fairbanks Mining district, or any part or portion of it? A. Yes.

Q. Just state in substance what that understanding or agreement was.

(Deposition of E. T. Barnette.)

A. There was an understanding; the only thing is I wrote to my brother in law for his power of attorney and some of my folks.

Q. When did you do that? A. In 1900.

Q. In what month in 1900?

A. I couldn't say exactly; it was in the spring of 1900.

Q. Where were you living at that time?

A. Dawson.

Q. In the Dominion of Canada. A. Yes, sir.

Q. What was your brother in law's name?

A. A. T. Armstrong.

Q. Where did he live at that time?

A. Akron, Ohio.

Q. Where does he live at the present time?

A. He has lived there, and—well, I think, until the 11th of this coming month.

Q. Has he ever been in the Fairbanks District of Alaska? A. Not to my knowledge.

Q. Has he ever been in the District of Alaska at all? A. No, sir.

Q. What folks beside A. T. Armstrong did you write to at that time—what folks referring to in your previous answer did you write to at that time with reference to getting any authority to locate the Dome Group claim or any other claims in the District of Alaska?

A. I knew nothing about the Dome Group at that time.

Q. What had your writing to A. T. Armstrong to do with the Dome Group claim?

(Deposition of E. T. Barnette.)

A. Nothing at that time.

Q. What has it since had to do with that claim?

A. I used some of the powers of attorney that he sent me.

Q. What powers of attorney did he send you at that time?

A. He sent me M. E. Armstrong, W. H. Sumner, Y. L. Newton, Selkirk and A. R. Armstrong and also his own, A. T. Armstrong.

Q. Have you got those powers of attorney or any of them with you? A. No.

Q. Have you ever recorded them in this recording district?"

Objected to as wholly immaterial.

Mr. JENNINGS.—It is just simply showing the circumstances.

The COURT.—He may answer.

"A. I don't think so.

Q. You never recorded any of them in the Fairbanks Recording District?

A. I don't think so; I'm not sure, but I don't think they are.

Q. What was the nature of those powers of attorney that you received at that time, with reference to giving you authority to locate or take up mineral land in the Fairbanks District of Alaska?"

Objected to as not the best evidence and not binding on the other defendants in this case.

Mr. JENNINGS.—I'm not offering it as evidence; I'm offering it as an admission of Mr. Barnette.

* * *

(Deposition of E. T. Barnette.)

Objected to as not binding on the other defendants in the case; any statement, declaration or act of Barnette is not binding on any of the other defendants.

Objection overruled. Exception.

Mr. McGINN.—Furthermore, it is not the best evidence, the location or powers of attorney speak for themselves, they being on file in this court in the case of Cook vs. Klonos.

Objection overruled. Exception.

"A. It is a general power of attorney.

Mr. COUSBY.—Were they all the same?

A. I couldn't say whether they are or not." * * *

"Q. What was this understanding or agreement which you had with A. T. Armstrong at the time those powers of attorney were forwarded to you at Dawson in 1900?

A. There was no understanding, only I wrote that if an opportunity came up I would stake for them—stake ground for them.

Q. Was there any understanding or agreement between you and any of those persons, either at that time or at any subsequent time that you were to have an interest in any mining claims or locations which you located or caused to be located for any of those persons under any of those powers of attorney?

A. Yes; at the time I wrote my brother in law this letter I stated that if opportunity came up I would stake ground for them acting as their agent, and would expect half for staking."

Mr. McGINN.—We object to all of this testimony on the same ground; it is understood the objection

(Deposition of E. T. Barnette.)

goes to the whole of it.

The COURT.—Yes, the objection may go to the whole of it and will be overruled, and counsel has his exception.

"Q. Did you get any response to that letter to the effect that you were to get half?

A. No, only the powers of attorney.

Q. The powers of attorney, then, provided you were to get half?

A. No, the powers of attorney didn't state anything about that at all.

Q. What, if anything, was contained in any of those powers of attorney with reference to any interest which you were to get in any property which you acquired?

A. There was nothing in them that I remember.

Q. Was there any agreement of any kind or character which accompanied these powers of attorney or any of them? A. No.

Q. How was the agreement made to the effect that you were to get a half interest in this property?

A. I stated that in the letter I wrote to my brother in law, that I would look after the claims, the location, etc., with the understanding that they would give me half.

Q. You wrote to your brother in law that if he would send you these powers of attorney, you were to have a half interest in any location which you made or caused to be made under them?

A. I wrote my brother in law to send me his power of attorney and get some of the folks to send theirs,

(Deposition of E. T. Barnette.)

and if opportunity came up I would stake for them, look after the ground, and would expect half for doing so.

Q. It was after that that you received these powers of attorney? A. Yes, after that.

Q. Was there any further response to your letter than the receiving of the powers of attorney?

A. No.

Q. Who is W. H. Sumner?

A. My brother in law.

Q. Where does he live? A. Medina, Ohio.

Q. Did you receive his power of attorney in 1900?

A. Yes.

Q. Who was Y. L. Newton?

A. My oldest sister's daughter.

Q. Where does she live?

A. She lives at Medina.

Q. What is her age?

A. O, she is twenty-odd years.

Q. How old was she in 1900?

A. I don't know how old she was.

Q. You think she is about twenty years old at the present time?

A. O, no, she is older than that now; she has three or four children and I guess she is older than that.

Q. About how old is she at the present time?

A. I couldn't tell you.

Q. Could you tell me about how old she is?

A. I think she is less than thirty.

Q. Do you think she is 25?

A. I couldn't tell you.

(Deposition of E. T. Barnette.)

Q. Who is M. E. Armstrong? A. My sister.

Q. Where does she live?

A. In Akron at the present time.

Q. Did you receive her power of attorney in 1900?

A. I did.

Q. About how old is she at the present time?

A. Thirty-odd years.

Q. Who is L. T. Selkirk?

A. She is a relative of my brother in law.

Q. Where does she live?

A. I think she lives in Cleveland, Ohio.

Q. Do you know whether she lives at Cleveland or not?

A. I couldn't say for sure, but I believe she lives there; that is where she was living the last I knew.

Q. Did you receive her power of attorney in 1900?

A. I did.

Q. Who is A. R. Armstrong?

A. My brother in law's sister.

Q. Where does she live?

A. I think she lives in Cleveland.

Q. You couldn't say whether she does or not?

A. I couldn't say; that is my belief, that she lives there at the present time.

Q. Do you know what her age is? A. No.

Q. Do you know whether Y. L. Newton has ever been in the District of Alaska?

A. Not to my knowledge.

Q. Did you ever see Y. L. Newton? A. Yes, sir.

Q. When was the last time you saw her?

A. In November last year, 1905.

(Deposition of E. T. Barnette.)

Q. Did you ever see L. T. Selkirk? A. Yes.

Q. Has she ever been in the District of Alaska?

A. Not to my knowledge.

Q. What is the street address of A. T. Armstrong?

A. Number 95 Rhodes Avenue, Akron, Ohio.

Q. What is the street address of W. H. Sumner?

A. I couldn't tell you.

Q. What is the street address of Y. L. Newton?

A. I couldn't tell you.

Q. What is the street address of M. E. Armstrong?

A. No. 95 Rhodes Avenue, Akron, Ohio.

Q. What is the street address of A. R. Armstrong?

A. I couldn't say.

Q. Where is A. T. Armstrong going to be after the 11th? A. On his way to Gold-bar, Washington.

Q. He is going to stay there is he?

A. I expect he will.

Q. Did these powers of attorney which you received at that time or any of them give you any right or power of substitution? A. Yes.

Q. You have those powers of attorney in your possession at the present time? A. No.

Q. Where are they?

A. I gave them to Mr. McGinn last summer some time." * * *

"Q. You're acquainted with Henry Cook?

A. Yes.

Q. Did you have a meeting in the Fairbanks Banking Company's bank in Fairbanks, Alaska, on or about the 20th of March, 1905, at which were present yourself, Henry Cook, and J. C. Ridenour?

(Deposition of E. T. Barnette.)

A. Yes, I met them there at that time, although I couldn't state the date exactly.

Q. State whether any conversation took place at that place and time between you three persons with reference to the location of the Dome Group claim?

A. Yes.

Q. What agreement was made at that time and place between you and Henry Cook and J. C. Ridenour with reference to the location of the Dome Group claim?

A. They were to go out and stake the group—that is, Cook and Ridenour were to go out and stake the group.

Q. Did you request them to go out and stake the Dome Group? A. No.

Q. How did the subject of the staking of the Dome Group claim on Dome Creek come up between you and Henry Cook and J. C. Ridenour at that time?

A. They stated that there was vacant ground out there, and asked me if group claims could be taken up.

Q. Henry Cook stated that to you?

A. I don't know whether it was Cook or Ridenour —it was one of them.

Q. What did you say in answer to that?

A. I told them that I believed that it was the law that they could take up an association claim.

Q. What further took place at that time between you three persons with reference to the location of this claim?'' * * *

''A. I furnished the supplies, boiler, tools, etc., and they were to go out and stake.

(Deposition of E. T. Barnette.)

Q. Was anything agreed upon at that time as to what particular ground was to be included within the Dome Group claim?

A. No; it was on the right limit, I don't know just exactly what they were to stake." * * *

"Q. You put the boiler on the Dome Group claim early in April, 1905?

A. I don't remember just when it was they went out there to go to work; I bought them a boiler and outfit.

Q. You sent it out to be worked on the Dome Group claim? A. Yes.

Q. What interest were you to get for doing that?

A. I was figuring on a half interest from the people I was representing.

Q. Did you have any agreement with any of them to that effect?

A. I thought I explained that agreement to you before.

Q. State whether you have had any agreement to that effect?

A. The only agreement was the letter that I wrote to my brother in law, and I told you two or three times what was in that.

Q. So you considered and understood when you sent out the boiler in April, 1905, that you were to get a half of the interest of A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk and A. R. Armstrong?"

Mr. McGINN.—We object to the answer and move it be stricken out; he can't testify as to what he sup-

(Deposition of E. T. Barnette.)

posed and make it binding on the other parties to this action—what he supposed these people in Ohio thought.

Mr. JENNINGS.—I will state to the Court this is not the only testimony, and if I don't show any better connection with them I will be very much mistaken.

Motion overruled. Exception.

"A. When I received the powers of attorney I supposed they took it for granted according to the letter I wrote to my brother in law that I was to have a half interest from them.

Q. I ask that the question be answered.

A. I certainly did expect a half interest in their interest.

Q. It was the only compensation which you were to get for sending the boiler out? A. Yes, sir.

Q. You also agreed at the time you had this conversation with Henry Cook and J. C. Ridenour in your bank about the 20th day of March, 1905, that you would send a box of grub out to Cook and Ridenour on Dome Creek to be used by them in locating and staking this property?" * * *

"A. I furnished them supplies to do the work.

Q. Did you ever send a box of provisions to Cook and Ridenour on the Dome Group claim on or about April, 1905?

A. I couldn't say. Whenever they sent in an order for supplies I sent them out. I don't know whether it was in a box or gunny-sack.

Q. State your best recollection as to whether you ever sent any grub or provisions out to Cook and

(Deposition of E. T. Barnette.)

Ridenour on Dome Creek on or about the month of April or March, 1905?

A. I presume I did; if they ordered it they got it."

* * *

"Q. Do you know how Cook and Ridenour got that location certificate of the Dome Group claim which they posted upon it at the time of their alleged location? A. Yes.

Q. How did they get it?

A. They got their instructions how to stake and locate from Mr. McGinn and Mr. Sullivan." * * *

"Q. Was there ever any agreement at any time to your knowledge between Henry Cook, and J. C. Ridenour, and the other plaintiffs in this case, by which they joined and united themselves into an association for the purpose of taking up association mining claims?

A. Through me as their agent they did.

Q. When and where was this association made?

A. I suppose when I gave them the names to stake with.

Q. Do you know whether it was made at that time?

A. I don't know of any other time." * * *

"Q. Did you ever inform the Armstrongs, Newton, Selkirk and Sumner that you had located the Dome Group claim in their names as six of the locators?

A. I don't know as I did particularly about the Dome Group claim; when I was back there—

Q. I am speaking now of the Dome Group association claim?

A. I don't know as I did. I don't know whether I

(Deposition of E. T. Barnette.)

mentioned the Dome group; I mentioned several of the groups I staked them in."

Mr. McGINN.—Objected to on the ground it is immaterial and not binding on these defendants, or any way the balance of the defendants, and not binding on these other people; these are not admissions, this is testimony—

Objection overruled. Defendants except.

"Q. You haven't any recollection of ever having told any of them of your having used their names or any of their names as locators in the group claiming the Dome Group claim?

A. I might have told them.

Q. I say, you have no recollection at the present time of ever having done so?

A. I couldn't say whether I have or not.

Q. Who has paid the expenses in connection with the location and work done on the Dome Group claim since March, 1905? A. I paid them.

Q. Have you ever made any demand upon A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk, and A. R. Armstrong that they pay or contribute any part or portion of the money expended by you upon or in connection with the Dome Group claim?"

Mr. McGINN.—Objected to as incompetent, irrelevant and immaterial and not binding on any of the other defendants in this case, and the question of accounting between Barnette and his principals is immaterial.

Objection overruled. Exception.

(Deposition of E. T. Barnette.)

" . *No.*

Q. Who has the control and management of the Dome Group claim with reference to Cook and Ridenour's title? A. I don't understand that question.

Q. Who has the management and control of the Dome Group claim under the title which Henry Cook, J. C. Ridenour, A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk and A. R. Armstrong are claiming?

A. Who has the management?

Q. Yes.

A. Ridenour and Cook, McGinn and Sullivan and the parties I represent as their agent.

Q. And yourself?

A. I have no interest in it yet, I am in hopes of having.

Q. Have you ever had anything to do with the management or control or disposition of the title claimed under the plaintiffs' alleged location?

A. I furnished the supplies to do the work, bought the boiler and everything of that kind.

Q. What you say is that the title of the plaintiffs is managed and controlled by Messrs. McGinn and Sullivan and Cook and Ridenour and the plaintiffs whose powers of attorney you hold?

A. No, sir, I manage their part of it as their agent.

Q. Don't you have anything to say in the management of the claim in respect to the plaintiffs, as to your half interest under your powers of attorney?

A. Not legally, I haven't.

Q. In point of fact, do you have anything to do with

(Deposition of E. T. Barnette.)

the management of the claim under the plaintiff's title?

A. No, not until I get may share from them.

Q. You never have had anything to do with it?

A. Not legally, I have not.

Q. What do you mean by qualifying it that way?

A. I have furnished the supplies, and expect to get my half interest from them all.

Q. Don't they consult you with reference to what they do? A. Who do you mean by 'they'?

Q. McGinn and Sullivan, Cook and Ridenour, A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk and A. R. Armstrong?

A. There has been no management of it only the development work.

Q. Do any of these persons ever consult you as to what is done in regard to this Dome Group claim?

A. I have talked with them about it.

Q. Who have you talked with about it?

A. Ridenour and Cook.

Q. Who else?

A. Possibly McGinn and Sullivan.

Q. You're not sure about that?

A. I couldn't say for sure.

Q. Now, you say that Mr. Cook told you at this meeting which you had in your bank about the 20th of March, 1905, that this ground which was going to be located as the Dome Group claim was vacant?

A. Yes.

Q. Mr. Cook did tell you that at that time, did he?

A. Yes.

(Deposition of E. T. Barnette.)

Q. Was anything said between any of you at that time as to whether anybody claimed the ground?

A. No, Mr. Cook and Ridenour said the ground had been staked some time before, but nothing done with it.

Q. Did Mr. Cook also say that?"

Mr. McGINN.—Objected to as incompetent, irrelevant and immaterial and not binding on the defendants, the testimony of Barnette being taken three or four years ago is not admissible at this time, he being within the jurisdiction of the Court.

Objection overruled. Exception.

"A. I couldn't say which one said it, whether it was Mr. Cook or Mr. Ridenour.

Q. Have you ever been out on the ground yourself prior to that time? A. No.

Q. Did you endeavor to ascertain from any other person whether what Cook and Ridenour said as to the ground being vacant or open for location was true? A. No." * * *

"Q. Why was it, Mr. Barnette, that your name wasn't used as a locator in the location of this Dome Group claim?

A. I don't know why it wasn't; there is no particular reason for it." * * *

"Q. The names of A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk and A. R. Armstrong used as locators in the location of this Dome Group claim were so used solely under the authority of the powers of attorney which you received in 1900 in Dawson?

(Deposition of E. T. Barnette.)

A. Yes, sir." * * *

"Q. Has any person or persons other than yourself furnished or supplied any money, provisions or machinery which was used on the Dome Group claim for the development of it or in connection with its location? A. No." * * *

"Q. Do you know who recorded the location certificate of the Dome Group claim? A. No, I do not.

Q. Did you pay for that?

A. I couldn't say whether I did or not; I'm inclined to think I did." * * *

Mr. JENNINGS.—That's all for the present.

Mr. McGINN.—Just one minute, if your Honor please; I suppose we have a right to introduce the other parts of this deposition that will in any manner explain or qualify what they have read.

[Excerpt from Deposition of E. T. Barnette in Case No. 1510 U. S. C. C. A. (Read by Mr. McGinn).]

"Q. Have you any interest in the Dome Group claim at this time? A. No, sir.

Q. Have you ever had any interest in it?

A. No, sir."

Mr. McGINN.—"Q. Did any other person have any interest in all or part for your benefit to hold it?

A. Not at the present time.

Q. Was there ever any understanding or agreement between you and any person whomsoever to the effect that you were to have any estate, right, title or interest whatever in the Dome Group claim situate on the right limit of Dome Creek below discovery in the Fairbanks Mining District, or any part or por-

(Deposition of E. T. Barnette.)

tion of it? A. Yes."

Mr. JENNINGS.—If the Court please, I'll ask that the record show that I finished reading all of the deposition of E. T. Barnette above referred to which was offered as admissions against interest, and that now Mr. McGinn claims there is something else there connected with those admissions which he is going to read.

Mr. McGINN.—Connected with and explanatory of them.

"Q. What further took place at that time between you three persons with reference to the location of the Dome Group claim," meaning Cook, Ridenour and Barnette?

"A. I furnished the boiler, supplies, tools, etc., and they would go out and stake.

Q. Was anything agreed upon at the time as to what particular ground was to be included within the Dome Group claim?

A. No, it was on the right limit; I didn't know just exactly what they were to stake.

Q. Was anything agreed upon at that time as to what interest Henry Cook was to have in this association claim that was to be located?

A. Yes, he and Ridenour were to have their one-eighth apiece.

Q. Was there any understanding or agreement made between you three persons at that time or any other time, whereby Henry Cook was to have any further or greater interest in the Dome Group association claim which was to be located than a one-

(Deposition of E. T. Barnette.)

eighth interest? A. Yes, later on there was.

Q. Upon what date was this subsequent agreement made? A. I couldn't say.

Q. About what date? A. Some time in April.

Q. What was the agreement made in April as to the interest of Henry Cook?

A. They went out and staked the property and put a hole to bedrock, then did some drifting at the bottom of the hole, and they wanted to do more work and they thought if they did that work they should have more of an interest.

Q. What was the agreement which was made in 1905 with reference to Henry Cook having a greater interest than a one-eighth interest in the Dome Group association claim that was located?

A. The agreement was that Cook and Ridenour would sink two more holes to bedrock and cross-cut, and would have one-twelfth more—

Q. Each?

A. No, one-twelfth more, making two-sixths—one-third in the claim." * * *

"Q. You have explained that the agreement made in April, 1905, was to the effect that Cook and Ridenour together were to have a one-third interest in the Dome Group claim? A. Yes, sir.

Q. State whether any agreement was made between you and Henry Cook and J. C. Ridenour, either in the month of March or April, 1905, or at any other time to the effect that they each were to have an undivided one-third interest in the Dome Group claim? A. No.

(Deposition of E. T. Barnette.)

Q. There was no such agreement? A. No.

Q. From whom did you get this certificate of location?" Now this was read.

"Q. Do you know how Cook and Ridenour got that location certificate of the Dome Group claim which they posted upon it at the time of their alleged location? A. Yes.

Q. How did they get it?

A. They got their instructions how to stake and locate from Mr. McGinn and Mr. Sullivan.

Q. From whom did they get this location certificate that was posted on the claim?

A. I couldn't say.

Q. Do you know who prepared that?

A. No, I couldn't say, I think—

Q. Do you know whether the location certificate was prepared before or after Cook and Ridenour went out to make the location of the Dome Group claim? A. I couldn't say as to that." * * *

"Q. Was there ever any agreement or understanding, to your knowledge, at any time, between Henry Cook, J. C. Ridenour, and the other plaintiffs in this case, by which they joined and united themselves into an association for the purpose of taking up association mining claims?

A. Through me as their agent they did.

Q. When and where was this association made?

A. I suppose when I gave them the names to stake with.

Q. Do you know whether it was made at that time?

A. I don't know of any other time.

(Deposition of E. T. Barnette.)

A. There was no agreement, I gave them the names and they used them.

Q. There was no agreement at that time?

A. Why, certainly, as I told you before, they were to get a one-eighth apiece.

Q. I say, there was no agreement made at that time you referred to as to joining yourselves together as an association?

A. The agreement was just as I have stated before; I furnished the names and they would stake; I furnished the supplies, boiler, etc.

Q. That was all the agreement that ever took place to your knowledge between any of the plaintiffs with reference to joining and uniting themselves as an association? A. Yes." * * *

"Q. Have you ever received any transfer or deed of conveyance of any kind or description from any of those persons transferring or conveying any interest in the Dome Group claim to you? A. Not yet.

Q. Or to any other person for you? A. No.

Q. Now, this additional one-twelfth interest which you agreed Cook and Ridenour should have, was given to them for putting down this second hole, was it?

A. For putting down two more holes and cross-cutting.

Q. Have those two holes been put down upon the claim? A. I believe so.

Q. That is, after the first hole was put down?

A. Yes.

Q. What was the object of making an agreement

(Deposition of E. T. Barnette.)

of that kind to have two further holes put down?

A. I don't know as any special object but to do more development work—more development work on the ground.

Q. What is the value of the development work that has been put upon the Dome Group claim that has been done on behalf of the plaintiffs?

A. I couldn't say.

Q. About what value?

A. O, between two and three thousand dollars." * * *

"Q. At whose request did they do it?

A. No one's request.

Q. They just did it on their own initiative?

A. When they got their one-twelfth interest then they agreed to put down two holes and cross-cut.

Q. That is all the compensation that Cook and Ridenour or either one of them ever got for doing this two thousand dollars worth of work, is the extra one-twelfth interest? A. Yes.

Q. There was no agreement or understanding that they are to get anything further from anybody?

A. The first hole was put down by them outside of these other two holes; the first hole was put down to make a discovery, and they were to get each a one-eighth of the group.

Q. When you say two thousand dollars' worth of development work has been done on the claim, would that include the value of the boiler you placed there, and of the grub and supplies you provided?

A. Yes, I presume about that—that that would cover it." * * *

(Deposition of E. T. Barnette.)

"Q. You testified that in April, 1905, as the agent of six plaintiffs in this action you entered into an agreement with Cook and Ridenour whereby you agreed to give then a one-twelfth interest in the Dome Group for sinking two additional holes to bedrock and cross-cutting? A. Yes.

Q. Now, I will call it to your attention to the date; was that in April or after that time—are you positive about the time?

A. I'm not positive about the date." This deposition was taken on the 30th day of June, 1906.

"Q. Was that agreement entered into before they completed their first hole or afterwards?

A. It was after.

Q. Do you know when they completed that first hole? A. No, I don't.

Q. After the first hole was completed, what work did Cook and Ridenour want to do on the property out there?

A. They wanted to cross-cut, or rather drift in the bottom of the hole that they had sunk.

Q. How was it that they left that hole and began to operate above?

A. They cross-cut some before that and I suggested to them that they go below and further up on the bench.

Q. What was done about that?" * * *

"A. Mr. Ridenour wanted to run the tunnel from the bottom of the shaft of the first hole, and I suggested to go down close to Pounder & Graham's ground.

(Deposition of E. T. Barnette.)

Q. And they sunk a hole down there?

A. How did this one-twelfth interest happen to be given to them?

A. There was other parties claiming the ground—

Q. How is it that you came to enter into this agreement giving them this one-twelfth for putting down two additional holes?

A. It seemed the group would be in litigation, and we made a further arrangement to have it do*en* so as to be protected.

Q. You stated on direct examination," and so forth, which doesn't apply.

"Q. The agreement that you had with Cook and Ridenour after that first hole was completed, was that the two together were to receive a one-twelfth interest from the other plaintiffs in the group?

A. Yes, sir.

Q. It wasn't to the effect that they were to receive a one-third interest?

A. No, sir; a one-twelfth interest.

Q. They would then hold one-third of the whole property? A. That would make them a one-third.

Q. Did you ever enter into any agreement with McGinn and Sullivan with regard to giving any interest in this property on behalf of these plaintiffs?

A. Yes.

Q. About what time was the agreement made and what were the terms of it?

A. It was about the time I made the arrangements with Cook and Ridenour to sink these two holes.

Q. What was the arrangement that was made with them?

(Deposition of E. T. Barnette.)

A. McGinn and Sullivan were to get a one-third interest in the group?

Q. What for?

A. For looking after the litigation and protecting the property.

Q. Was anything known about the value of this property at that time?

A. Not to know definitely, no, sir.

Q. When was that agreement made?

A. I couldn't say whether it was in April or May; it was after they had completed the first hole.

Q. It was before suit was instituted?

A. Yes, sir.

Q. Can you be sure whether it was before the hole was completed or not?

A. No, I think it was after that, but I'm not positive.

Q. If this suit was commenced upon the 24th day of April and the hole was not completed until May, what would you say then?

A. Well, I'm not positive; I couldn't say.

Q. You're positive that it was before the suit was commenced? A. Yes.

Q. So at the present time the plaintiffs Cook and Ridenour are entitled to a one-third interest in the property, McGinn & Sullivan are entitled to a one-third interest in the property, and you are entitled to half of what the plaintiffs hold as agent for them in acquiring this property?

A. I'm in hopes of getting half; I don't own it yet." * * *

(Deposition of E. T. Barnette.)

"Q. Was this agreement which you made with McGinn & Sullivan in writing? A. No, verbal.

Q. It was just a verbal agreement? A. Yes, sir.

Q. Wasn't it understood and agreed between you and Cook and Ridenour at this first meeting held at your bank March the 20th, 1905, that McGinn & Sullivan were to receive an interest of the Dome Group claim? A. At what time?

Q. At the time of the meeting in your bank about the 20th of March, 1905?

A. No, I don't think McGinn's and Sullivan's names was mentioned at all.

Q. Are you certain about that?

A. I'm sure of it.

Q. Had you had any talk with McGinn & Sullivan or either of them prior to your understanding and agreement made with Cook and Ridenour in your office about the 20th day of March, 1905?

A. I didn't know there was any vacant ground on Dome Creek myself.

Q. Answer the question. A. No; I had none.

Q. Didn't you or Cook or Ridenour to your knowledge consult with your attorneys upon the question of the necessity of discovery upon this ground in regard to its being open for location? A. No.

Q. No attorney whatever was consulted by you upon that subject prior to the making of the location? A. Not that I remember of.

Q. Nor by any of the plaintiffs to your knowledge?

A. I couldn't say what they did.

Q. I say of your own knowledge?

(Deposition of E. T. Barnette.)

A. Not to my knowledge, no.

Q. You just relied upon your own knowledge of the law upon that subject, the matter of the location?

A. Yes.

Q. Do you know whether or not McGinn and Sullivan gave Cook any instructions how this property should be staked or anything of that kind—do you know anything about that?

A. No, I do not." And so forth.

Mr. JENNINGS.—I now am about to read parts of the deposition of Henry Cook, taken at the instance of the defendants in the cause of Henry Cook et al. vs. John Klonos et al., filed in this court, No. 278, and I will ask Mr. McGinn, I suppose there will be no objection as to the verity of this document?

Mr. McGINN.—O, that's his signature, I think.

Mr. JENNINGS.—There is no doubt about its accuracy.

Mr. McGINN.—Let's see the original deposition. (After examining.)

Defendants objected to any part of the testimony or deposition of Henry Cook being introduced in this case, as not binding upon E. T. Barnette, J. C. Ridenour, M. L. Sullivan and John L. McGinn, he being at most a cotenant, and the declarations or admissions of one cotenant is not binding upon another.

Objection overruled.

Defendants except.

[Excerpts from Deposition of Henry Cook, in Case No. 1510, U. S. C. C. A. (Read by Mr. Jennings).]

Mr. JENNINGS.—(Reading:)

"*In the District Court for the District of Alaska, Third Judicial Division.*

No. 278.

HENRY COOK, J. C. RIDENOUR, A. T. ARMSTRONG, W. H. SUMNER, Y. L. NEWTON, M. E. ARMSTRONG, L. T. SELKIRK and A. R. ARMSTRONG,

Plaintiffs,

vs.

JOHN KLONOS, E. BURKE, FRITZ BLOCK, W. G. HASTINGS, FRED BRETHINGER, HENRY PRIGGER, NEIL McLEOD, WILLIAM GERRIE, HENRY HAVERY, JAMES GIANAKUS, GILBERT McINTYRE, CHARLES LOVETT, ALBERT ANCHORS, H. M. PROSSER, NATHAN ZEIMER, RICHARD STAFFORD, JAMES OSBORNE, H. K. FREEMEN, V. A. GREEN, T. E. WOOLDRIDGE and L. B. ANDERSON.

Defendants."

Mr. McGINN.—It is agreed that this deposition was read in No. 278; there is no need of putting all that stuff in.

Mr. JENNINGS.—(After reading caption:)

"HENRY COOK, being first duly sworn, on oath testified as follows:

(Deposition of Henry Cook.)

Direct Examination.

By Mr. COUSBY.—Your name is Henry Cook?

A. Yes, sir.

Q. You are one of the plaintiffs in the case of Cook et al. vs. Klonos pending in the District Court?

A. Yes, sir."

Mr. JENNINGS.—I forgot to state that this deposition appears to have been taken on the 9th day of August, 1905, as appears from the certificate of the Notary.

"Q. What is your occupation here?

A. Oh, mining, I suppose.

Q. How long have you been mining?

A. Oh, I mined up in Dawson and mined here.

Q. Who is J. C. Ridenour?

A. He is my partner up there out on the creek.

Q. How long have you known him?

A. Oh, I have known him ever since last Christmas, February.

Q. Is he living out there now?

A. He went out this morning.

Q. Who is A. T. Armstrong?

A. Well, I don't know. I got this power of attorney from Captain Barnette.

Q. Power of attorney for whom?" I suppose it means from whom.

"Q. Power of attorneys for whom? A. T. Armstrong? A. Yes.

Q. W. H. Sumner? A. Yes.

Q. Y. L. Newton? A. Yes.

Q. M. E. Armstrong? A. Yes.

(Deposition of Henry Cook.)

Q. L. T. Selkirk? A. Yes.

Q. A. R. Armstrong? A. Yes.

Q. Do you know any of these six persons?

A. I never saw them that I know of.

Q. You have gotten the powers of attorney from Captain Barnette— A. Yes.

Q. To represent them in taking up mining ground? A. Yes.

Q. Have you got that power of attorney with you?

A. No, I haven't got it here.

Q. Has it ever been recorded?

A. Well, I don't know, I suppose it is recorded all right.

Q. Do you know whether it is or not?

A. No, I do not.

Q. Where is the power of attorney itself?

A. Well, I don't know where.

Q. What did you do with it after you got it?

A. I never got it.

Q. Did Captain Barnette keep it?

A. Yes, I suppose.

Q. He just showed it to you? A. Yes.

Q. And you never had it in your possession?

A. No.

Q. About what date was that, Mr. Cook?

A. That was about the 20th or 21st of March.

Q. 1905? A. Yes.

Q. Where did this occur, at Fairbanks?

A. Yes.

Q. And you don't know anything whatever about any of those six persons? A. No.

(Deposition of Henry Cook.)

Q. When did you first become acquainted with Dome Creek?

A. I went out to Dome Creek about the 23d of December, 1904.

Q. What part of the creek did you go to then?

A. I went up to Three Above creek.

Q. Did you go on any other part of the creek at that time?

A. No, I was up and down the creek a little; I sunk two holes on Three Above creek.

Q. About what date in December was that?

A. I went over there on the 23d of December.

Q. How long did you stay there?

A. I stayed there until now; it is my home yet.

Q. Have you got a cabin on No. 3 Above?

A. Yes, on No. 3 creek."

Mr. JENNINGS.—I want to show the connection; I want to show by these questions here which I submit to the Court (handing to Court) to show the intimate relations between Cook and Ridenour.

Mr. McGINN.—This isn't fair; it is a deposition taken some years ago when this question was not an issue in the case. The examination was not carried on with that in view at all. Now, they are undertaking to use the deposition against the defendants in this case when Cook himself is here and can be called and put on the witness-stand, and I can show to the Court that his deposition taken that way can't be read when he is within the jurisdiction of the Court and our statute expressly so provides.

Objection overruled. Exception.

(Deposition of Henry Cook.)

"Q. That is where you have resided since December?

A. No, not in that cabin, I haven't, not since—

Q. How long did you live on No. 3 Creek?

A. I was there until about the 20th of March.

Q. About the 20th of March? A. Yes.

Q. Where did you live after the 20th of March, 1905?

A. Then, I went down to No. 1 Below into a cabin; I sunk a hole there.

Q. How long did you stay there?

A. O, about two months.

Q. Where did you go then?

A. To No. 4 below and lived in a tent down there on the first tier.

Q. About what date did you go there?

A. O, something about the first of June somewhere.

Q. Are you still there?

A. Yes, sir, that is my home now.

Q. Are you acquainted with a claim known as the Dome Group claim, containing 160 acres?

A. Yes.

Q. Did you do anything towards locating that claim?

A. I didn't help to stake it, no; I got hurt as I was going over or rather coming back down Fox; I slipped on the ice and hurt my hip and my partner Ridenour staked the claim.

Q. He staked the Dome Group claim, the ground?

A. Yes.

(Deposition of Henry Cook.)

Q. You were not present? A. No, sir.

Q. When did you first have anything to do with the Dome Group claim? A. At that time.

Q. What date was that?

A. That was the 24th of March the Group was staked; it was practically staked on the 23d and finished on the 24th.

Q. Were you present?

A. No, I wasn't present there; I came on into town.

Q. When did you first have anything to do personally about the location of the claim?

A. About a week or ten days after that, I think I was in town here five or six days.

Q. Which would be about the first of April?

A. Yes, sir, somewhere along there.

Q. Have you got any memoranda that shows the exact date when you got out there in April?

A. No.

Q. After you got out there, what if anything did you do in connection with locating or staking or locating the Dome Group claim?

A. Sank a hole to bedrock—finished that hole on to bedrock.

Q. You didn't do anything at all in regard to staking the claim?

A. No, I helped to cut the lines out this summer, that's all.

Q. On what date were the lines cut out?

A. O, they were cut out some time in May, I couldn't say what date.

(Deposition of Henry Cook.)

Q. Who cut them out? A. Me and Ridenour.

Q. Anybody else.

A. Well, not connected with us. There has been a lot of people cutting lines out there; there have been so many lines cut that there is nothing to cut any more.

Q. No one else was assisting you who was interested in the Dome Group? A. No.

Q. You think that was about May some time?

A. Yes, sometime about the last of May.

Q. Now, when you went on this claim No. 1 below, first tier, right limit, in April, what did you do?

A. I kept on sinking down to bedrock.

Q. How far down was that hole when you got on the claim? A. When I got on the claim?

Q. Yes?

A. Oh, it might be 25 or 30 feet; it might be 30 feet.

Q. Who had put that down?

A. Ridenour and a man by the name of Morrison who I sent out there to work in my place.

Q. What was Morrison's first name? A. Peter.

Q. Was anybody else working then?

A. No, only Ridenour and him.

Q. Was there any other hole on claim No. 1 below, first tier, at that time? A. No, sir.

Q. Was there any other hole that had been commenced to be put down? A. No, sir.

Q. You weren't there when this hole that was down 25 feet was commenced? A. No, sir.

Q. You don't know who started that hole?

(Deposition of Henry Cook.)

A. Yes, I know who started it.

Q. Of your own knowledge?

A. Yes, Ridenour and Morrison started the hole.

Q. They told you that? A. Yes.

Q. You don't know of your own knowledge?

A. I passed right by there; it was right back of the cabin; it is only about 70 or 80 feet right back of the cabin.

Q. When you first saw it it was about 25 feet down? A. Yes.

Q. You didn't see it when it was commenced?

A. No, but I would have seen it if it had been there when I passed by there; it is right on the trail.

Q. When you passed by there when?

A. When we went to the cabin, when we took our grub over there to start there.

Q. The first of April?

A. No, the 22d of March I was over there and I got hurt and couldn't work and came in to get a man to go there in my place.

Q. Is Ridenour a partner of yours? A. Yes.

Q. How long has he been a partner?

A. Since we went on this Dome Group.

Q. Mr. Barnette got you and Ridenour to go out and stake this group?

A. Yes, we went out and staked the group.

Q. I say Mr. Barnette got you and Ridenour to go out and stake this group? A. Yes.

Q. Where did you get your information as to what particular part of the creek to stake in the group?

A. Where did I get my information?

(Deposition of Henry Cook.)

Q. Yes. A. I got it from myself.

Q. Were you familiar with where the paystreak was supposed to be?

A. No, I wasn't, but I just took a chance; I know pretty near as much about Dome Creek as anybody on the creek—probably a lot more than lost of them.

Q. Did you tell Ridenour whereabouts to set the stakes?

A. No, I didn't; I told him what ground we calculated to take in.

Q. That is, the ground that was staked?

A. That is the ground that we staked.

Q. Was anything said by Captain Barnette as to what ground was to be staked in this group?

A. No, sir.

Q. What interest has Captain Barnette in the group?

A. Well, he is supposed to get an interest in the group.

Q. What interest?

A. Well, he is supposed to get a one-third interest in the group.

Q. A one-third interest from each of the eight locators? A. Yes."

Mr. McGINN.—We object to that as not a correct statement; it is a mistake absolutely of the witness; under that it would appear he was to get a third of Cook's and Ridenour's.

Mr. JENNINGS.—I am just reading it now; he can explain when he gets on the stand.

The COURT.—The serious objection is his suppo-

(Deposition of Henry Cook.)

sition, but he may answer. (Defendants except.)

"Q. Were any papers signed to that effect by you?

A. No.

Q. By anyone to your knowledge? A. No.

Q. That was the understanding between you and Captain Barnette when you went out to locate the claim in the names of the persons he gave you?

A. Yes."

Mr. JENNINGS.—Now, if the Court please, I have here the printed copy of bill of exceptions prepared by the plaintiffs in the case of Henry Cook, J. C. Ridenour, A. T. Armstrong, Y. L. Newton, M. E. Armstrong, L. T. Slekirk and A. R. Armstrong—which is a printed record of the case of the persons I have just named, against John Klonos et al., No. 278, in this court, and which is No. 1510 in the United States Circuit Court of Appeals for the Ninth Circuit, and the said paper contains the testimony of E. T. Barnette, and I wish to read some of that if Mr. McGinn doesn't object on the ground that it is not properly identified. If that is the objection, I will have to identify it further.

Objected to on the ground that Captain Barnette is within the jurisdiction of the court here in Fairbanks and can be called as a witness; that his statements and declarations are not binding upon the other defendants in this case, and of course we object to the testimony also on the ground that it is incompetent, irrelevant and immaterial for any purpose, and furthermore it has not been shown that any statements or declarations made by Barnette are

(Deposition of Henry Cook.)

binding upon any of the owners of the Dome Group association claim.

The COURT.—On what ground do you rely, Mr. Jennings, for its admission?

Mr. JENNINGS.—I rely, if the Court please, upon this ground: No. 278 was a suit brought by the Armstrongs, Sumner, Newton, Selkirk, Cook and Ridenour to clear their title as against certain people, with respect to this same Dome Group. They produced certain testimony, and among the testimony was the testimony of E. T. Barnette, and they produced it to secure the action of the Court in that case, and having produced it that testimony is their own testimony and it becomes theirs by adoption and they are bound by the admissions made by the witnesses which they produced. I want the Court to understand that this is the oral testimony of Mr. Barnette in that case, No. 278, and what I have read just now are the depositions taken at the instance of the defendants in that case in the nature of bills of discovery to find out things before the suit came on for trial. But this No. 1510 is the printed record and bill of exceptions prepared by these gentlemen, and contains the testimony of Captain Barnette at the trial in court, in No. 278.

The COURT.—It may be admitted—objection overruled.

Defendants except.

The COURT.—There is no objection on the ground that this is not a true copy and correct transcript?

Mr. McGINN.—No; it is a correct transcript of the testimony.

(Deposition of E. T. Barnette.)

Mr. JENNINGS.—(Reading from record, p. 333:)

[Excerpts from Deposition of E. T. Barnette in Case No. 1510, U. S. C. C. A. (Read by Mr. Jennings).]

"E. T. BARNETTE, after being called as a witness on behalf of plaintiffs and sworn, testified as follows, to wit:

Direct Examination.

(By Mr. McGINN.)

Q. What is your name? A. E. T. Barnette.

Q. You reside in the Fairbanks Recording District? A. I do.

Q. How long have you resided here?

A. Since 1901.

Q. Are you acquainted with Arabella R. Armstrong? A. Arabella Armstrong, yes, sir.

Q. How long have you known her?

A. About four years.

Q. I will ask you if you ever received a power of attorney from her? A. Yes, sir.

Q. I will ask you to examine this power of attorney marked Plaintiff's Exhibit 3, and state whether or not that is the power of attorney that you received."

Mr. McGINN.—Before we proceed further with this particular phase of the matter, there are certain parts of the deposition of Henry Cook I want to introduce in explanation of what he (Mr. Jennings) has already read.

The COURT.—Very well, I think that ought to be done at this time.

[Excerpts from Deposition of Henry Cook in Case No. 1510, U. S. C. C. A. (Read by Mr. McGinn etc.).]

(DEFENDANTS' EXCERPTS FROM DEPOSITION OF HENRY COOK.)

Mr. McGINN.—(Reading from deposition Cook in #278:)

"Q. After you got out there in April and commenced to work in this hole that was down 25 feet, how long did you continue working in that hole?

A. Until I got to bedrock.

Q. On what date was that?

A. I don't know, I got down somewhere about the 20th of May.

Q. Have you got the date down anywhere so you could be sure as to the exact date."

Mr. JENNINGS.—That's a part I wasn't allowed to read; I stopped at the middle of page 8, and didn't read that at all.

Mr. McGINN.—You read things in connection with it.

The COURT.—If it is connected with it in any way—

Mr. JENNINGS.—I submit it has no connection at all; I don't propose to be bound here by all of Henry Cook's testimony in another case, only by the admissions he has made against interest.

The COURT.—The admission, or anything that goes to explain the admission.

Mr. JENNINGS.—I submit that this doesn't explain anything.

(Deposition of Henry Cook.)

Mr. PRATT.—I would like to suggest, that the testimony Mr. Jennings read was with reference to the one point, the nature and character of this location as between the alleged locators.

Mr. McGINN.—They didn't confine it to that.

Mr. PRATT.—Yes, we did, the Court confined it; no, when his deposition broke off onto the subject of sinking holes and building cabins the Court said that had nothing to do with it.

Mr. McGINN.—The Court admitted it. I objected, but your Honor said it was material and they insisted on it and the Court let it in as to the work—the hole Cook and Ridenour were putting down on One.

The COURT.—That is true—as preliminary to something else, for the purpose of enabling the jury to understand what was material, but on the assumption that this testimony was admitted and simply for the reasons counsel stated: As to this location, the rights of these people as against anybody else out there on account of previous location or previous work isn't material. Let me see the deposition if there is any question about it. (Court examines deposition.)

Mr. JENNINGS.—That, if the Court please, is something going on to establish the validity of the Dome Group location, and something else entirely outside of these admissions I have read.

Mr. McGINN.—You're undertaking to show it is invalid.

Mr. JENNINGS.—I'm not introducing it to show

(Deposition of Henry Cook.)

the validity of it; I am showing his admissions to show its invalidity. You can introduce your own testimony to show its validity when you get to it.

Mr. McGINN.—The jury is entitled to it all.

The COURT.—Well, I think this may be material on this ground Mr. Jennings, as to the question of how much work was done before the second agreement with Cook and Ridenour.

Mr. JENNINGS.—It is a few minutes until 12:00 now, and if the Court will excuse the jury, I will explain to the Court why I think it is absolutely inadmissable.

Whereupon the jury was excused in charge of their sworn bailiffs until 2 P. M.

The COURT.—Now, the only matter I see there, Mr. Jennings, that led me to believe it might be proper, is the explanation of the second interest Cook and Ridenour acquired; they state there the nature of the first discovery of gold, which might go to show whether or not this was a completed location before they acquired their second interest. That's the only reason I see that the testimony might be admissable in explanation of that second acquisition there.

Mr. JENNINGS.—That's the very reason I believe it is not admissable and the ground on which I object to it, because they are now trying to prove their discovery of gold. (Reading extracts from deposition at point discontinued.) Now, we don't admit that they found any gold at all; we don't want to be bound by any admission he made that he discovered gold. We claim that the Dome Group is absolutely

(Deposition of Henry Cook.)

void, and we produce Henry Cook's and the other admissions in the depositions on that point.

The COURT.—The only purpose it can be admitted for, Mr. Jennings, is this: If Mr. Cook testifies that he had more than a one-eighth interest prior to a discovery or a consummation of the claim, the location is void as to him. If he acquired that interest subsequent to the consummation of the location, it is not void as to him; at least it is not void on that ground. It can't hurt you, Mr. Jennings, because if necessary the jury can be instructed that they are not to take that as against you.

Mr. JENNINGS.—As any admission against us—as a part of our testimony?

The COURT.—Why, no, as far as you are concerned.

Mr. JENNINGS.—With that explanation, if the Court please, we don't object to him reading the whole deposition.

The COURT.—The only admission is as to what interest Cook had at the time of discovery.

Mr. JENNINGS.—If we are not to be bound by it, all right.

The COURT.—Speaking about being bound by it, the jury is to say whether it is true—that's the only binding part of it.

Mr. JENNINGS.—All we are bound by is the admissions that Henry Cook made against interest.

The COURT.—Of course, the jury will determine whether or not it is true, but you will not be bound by all he says.

(Deposition of Henry Cook.)

Mr. JENNINGS.—All right, your Honor.

Mr. JENNINGS.—If the Court please, we would like the record to show that Mr. McGinn is now reading a portion of the deposition of Henry Cook in answer to the portions I read—he is reading those portions that he claims are material as explaining what has gone before.

The COURT.—Very well.

By Mr. McGINN.—(Reading from Cook deposition:) "Q. After you got out there in April and commenced work in this hole that was down 25 feet, how long did you continue work in that hole?

A. Until I got down to bedrock.

Q. On what date was that?

A. I don't know; I got down to bedrock somewhere about the 20th of May.

Q. Have you got the date down anywhere so you could be sure of the exact date?

A. No, I haven't got it.

Q. You didn't make any memorandum of that?

A. No, but I know that it was so near the 20th of May that it was within a day or so either way.

Q. When did you first get down to the gravel in that hole?

A. On the 5th day of April, when I first struck gravel.

Q. How far down from the surface?

A. How far down from the surface?

Q. Yes? A. Sixty-two feet.

Q. On the fifth of April?

A. On the 5th of April.

(Deposition of Henry Cook.)

Q. This hole was down 62 feet on the 5th of April?

A. On the 5th of April.

Q. How many days was that after you got out there and commenced working in the hole?

A. Four or five days or something—I think five or six days or something, that I worked there.

Q. So you went down about thirty-five feet in the five days you were personally there?

A. Well, five or six days; I couldn't tell to a day or so. I didn't keep no particular track of how long it took to put it down after I went down. We picked it down the whole thing sixty-two feet in the time I worked and they worked, in about eleven or twelve days.

Q. When did you first find any gold on the claim?

A. On the 15th day of April.

Q. How far down was that?

A. About 70 or 75 feet in about fifteen feet of gravel.

Q. Was that the first pan that was taken?

A. That was the first pan I got; I got colors.

Q. Did anybody else pan besides you at that time?

A. Yes, Ridenour.

Q. On the 15th of April? A. Yes.

Q. That was the first day upon which gold was discovered in the shaft? A. Yes, sir.

Q. How many colors did you find?

A. O, four or five colors.

Q. How many pans did you make?

A. O, I panned three or four pans—panned three or four pans.

(Deposition of Henry Cook.)

Q. Did anybody else besides you and Ridenour find anything in that hole up to the 15th of April?

A. No."

Mr. JENNINGS.—Now, I want to take back what I said—that isn't material to anything that I read of Cook's deposition, I merely reading the conversation concerning Barnette and sending him out there.

The COURT.—Well, as I stated, Mr. Jennings, before recess, I doubt if that is hardly in line, but the only object to the testimony was to get the witness' explanation as to whether or not there was a complete location before the second contract was made wherein he claims he acquired an additional interest above a one-eighth. That can be the only purpose of it.

Mr. JENNINGS.—Well, now, your Honor, our testimony was simply to the effect that he did acquire an additional interest; as to when, why, or what for that is a matter for them to prove in their case when they get to it.

The COURT.—I think it is proper to take all of his testimony together on that point. You asked him when he acquired those interests, and your evidence shows. It seems to me the various steps are proper to indicate—whether his testimony taken as a whole would indicate that at the date of the location he had more than twenty acres.

Mr. JENNINGS.—That isn't the point in controversy, whether he had or not.

The COURT.—That may be one of the points—which is, as to whether or not that contract of his

(Deposition of Henry Cook.)

would avoid the location as to him.

Mr. McGINN.—That's all we desire to read.

Mr. JENNINGS.—Then, we move that it be stricken out as absolutely immaterial, irrelevant, and not binding on us in any sense of the word, and not tending in any way to explain anything that we introduced of the admissions of Mr. Cook.

The COURT.—The motion denied.

Mr. JENNINGS.—Now, if the Court please, I wish to read a portion of the deposition of J. C. Ridenour taken on the third day of May, 1905, in cause No. 278 of the files of this court heretofore referred to, and being the same case in which Henry Cook's deposition was taken.

Mr. McGINN.—To which we object on the grounds that it is incompetent, irrelevant and immaterial and not binding on the defendants for the reason that the deposition of Ridenour cannot be used in this case as he is present in the courtroom and can be placed upon the witness-stand by the plaintiffs.

Objection overruled. Exception.

Mr. JENNINGS.—In order that the record may be straight, I started in the forenoon to read some printed testimony in cause No. 1510, C. C. A., the bill of exceptions but I now am reading from this deposition of J. C. Ridenour taken in the cause I have just referred to at the instance of the defendants in that case.

[Excerpts from Deposition of J. C. Ridenour in Case No. 1510, U. S. C. C. A. (Read by Mr. Jennings).]

"J. C. RIDENOUR, being first duly sworn, testified as follows:

Mr. COUSBY.—You're J. C. Ridenour, one of the plaintiffs in the case of Cook et al. vs. Klonos et al., pending in the District Court? A. Yes.

Q. Where do you live? A. On Dome Creek.

Q. How long have you lived there?

A. I have lived on Dome continuously since the 22d day of March, 1905.

Q. What part of Dome Creek are you living on now? A. Four below, first tier.

Q. Who lives with you? A. Henry Cook.

Q. How long have you lived there on 4 below?

A. Since the 10th of June, 1905.

Q. Are you acquainted with A. T. Armstrong?

A. No, sir.

Q. Do you know who he is? A. No, sir.

Q. Do you know where he lives? A. No, sir.

Q. Do you know W. R. Sumner, who he is?

A. No, sir.

Q. Do you know who Y. L. Newton is?

A. No, sir.

Q. Do you know who M. E. Armstrong is?

A. No, sir.

Q. Do you know who L. T. Selkirk is?

A. No, sir.

Q. Do you know who A. R. Armstrong is?

A. No, sir.

Q. Do you know where any of those persons named

(Deposition of J. C. Ridenour.)

live at the present time? A. I do not.

Q. Did you ever see any of them?

A. Not to my knowledge.

Q. Did you ever have any business dealings or relations with them or any of them?

A. Not outside of the staking of the Dome Group association claim.

Q. Were you ever constituted or appointed agent or attorney in fact for any of those persons?

A. Was I?

Q. Yes? A. No, sir.

Q. Did you ever act or purport to act as the agent or attorney in fact of any of these persons?

A. Why, I staked the Dome Group association claim, I suppose that would be considered as agent."

* * *

"Q. Did you make any arrangements in here with anybody about locating any ground out on Dome Creek? A. Yes, sir.

Q. Who did you make any arrangements with?

A. We made arrangements with Captain Barnette.

Q. About what date would that be?

A. About the 19th or 20th of March.

Q. Whereabouts did you and Mr. Cook and Mr. Barnette meet to make this arrangement?

A. At the Fairbanks Banking Company's Building.

Q. Who else was present at the time?

A. No one.

Q. Was anyone else present during any of your interview or conversation with Mr. Barnette?

(Deposition of J. C. Ridenour.)

A. No, sir."

Defendants move that the testimony be stricken out as incompetent, irrelevant and immaterial, for the reasons already assigned.

Motion denied. Exception.

"Q. Was anything said to the effect that you and Henry Cook were to have a one-third interest in that location? A. No, sir.

Q. Were any names furnished to you or to Henry Cook by Captain Barnette at that time, to use as locators in the location of this group on Dome Creek?

A. At that date?

Q. Yes?

A. The names were not furnished to us then; he said he would furnish the names.

Q. Captain Barnette agreed at that time, about the 20th of March, to furnish you and Henry Cook with the names of the persons who were to be locators of this association claim to be located on Dome Creek?

A. He agreed to furnish the names, and we made the arrangement to make the location and stake the association claim, which was the six names outside of our own.

Q. Were the names furnished by Captain Barnette to you or Mr. Cook before you left town?

A. No, sir.

Q. Did you make inquiry of Captain Barnette as to who these names were that were going to be furnished? A. No, sir.

Q. Do you know the ground on Dome Creek called

(Deposition of J. C. Ridenour.)

the Dome Group claim? A. Yes, sir.

Q. Who staked it? A. I staked it." * * *

"Q. Was there a paper notice posted on this initial stake by Peter Morrison on the 24th?

A. I posted the paper notice.

Q. Who wrote it out?

A. McGinn wrote the notice of location.

Q. Who did you get it from?

A. The notice of location?

Q. Yes.

A. It came put with our grub in an envelope.

Q. When did your grub get out there?

A. Our grub got out on the 22d of March.

Q. You got this notice already made out before you left town? A. No, sir.

Q. Who brought your grub out?

A. Barnette sent it out.

Q. And this notice all prepared came out along with your grub? A. Yes, sir.

Q. Sent out by Captain Barnette?

A. McGinn and Sullivan sent it along; I don't know whether he handed it to Captain Barnette or not.

Q. Captain Barnette sent the grub out, did he?

A. Yes, sir." * * *

"Q. Did you have any arrangements made with Captain Barnette before you left town to have him send the grub out to you? A. Yes, sir.

Q. Were the names of any of the locators signed to this notice when it reached you? A. Yes, sir.

Q. Whose names were signed to it then?

(Deposition of J. C. Ridenour.)

A. Wait a minute—you mean signed with pencil, or pen?

Q. Signed with anything with which a person could write?

A. Their names were printed into the notice of location as claimants.

Q. Whose names were printed on this notice referred to?

A. Henry Cook's and my name and those names you have there.

Q. A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk and A. R. Armstrong? A. Yes, sir.

Q. Did you sign this notice as agent or otherwise before posting it?

A. Yes, I signed their names and signed Henry Cook's name as agent.

Q. You signed Henry Cook's name as agent?

A. Yes, sir.

Q. Did Mr. Morrison sign his name to it?

A. He signed his name as a witness.

Q. Was that notice posted on your initial stake on the 24th of March, 1905? A. Yes, sir.

Q. How long did it remain there?

A. It is standing there yet.

Q. Did it contain any description of the ground which you staked? A. Yes, sir.

Q. Was that description in the notice at the time you received it?

A. The description of the ground?

Q. Yes. A. Yes, sir.

(Deposition of J. C. Ridenour.)

Q. Was it arranged in town here between you and Mr. Cook and Mr. Barnette that you were to stake and locate some particular piece of ground on Dome Creek when you came out?

A. Mr. Cook made the arrangements about the ground that was to be staked.

Q. And you just posted the notice with the description as it was sent out? A. Yes, sir." * * *

"Q. Do you know where the cabin is that is now occupied by Gus Juntella on No. 1 Below first tier on Dome Creek? A. I do."

Defendants object and move the question and answer be stricken.

The COURT.—It may be preliminary to something else.

Objection overruled, motion denied. Defendants except.

"Q. That cabin was on the ground at the time you made your location of the Dome Group claim"?

Same objection and ruling. Exception.

"A. It was.

Q. About how far from that cabin is this initial stake that you placed?

A. About 100 feet, I should judge."

(p. 22) "Q. How long did you continue to occupy it after the 22d day of March?"

Objected to as incompetent, irrelevant and immaterial and not binding on the defendants.

Objection overruled. Exception.

"A. Until about the tenth of June.

Q. Did anybody else live there with you during any

(Deposition of J. C. Ridenour.)

part of the time?

A. Morrison lived there awhile with me, a few days while he worked for me.

Q. Did Henry Cook live in it too? A. Yes, sir."

Mr. JENNINGS.—That's all of that description we care about.

The COURT.—Is there any portion of it you desire to read, Mr. McGinn?

Mr. McGINN.—Yes, your Honor. The last question that counsel read.

[Excerpts from Deposition of J. C. Ridenour in Case No. 1510, U. S. C. C. A. (Read by Mr. McGinn).]

"Q. Did you ever act or purport to act as agent or attorney in fact for any of these persons?

A. Why, I staked the Dome Group association, I suppose that would be as agent.

Q. Who did you stake for?

A. For Henry Cook, myself, and those parties named.

Q. Who asked you to stake it for Henry Cook and those persons? A. Who asked me to stake it?

Q. Yes, sir. A. Henry Cook.

Q. On what date did Henry Cook ask you to stake that claim in the names of those eight persons?

A. On the 23d day of March.

Q. Where were you at the time that request was made? A. On Dome Creek.

Q. In 1905? A. Yes.

Q. On what part of Dome Creek?

A. We were on One Below.

Q. You and Henry Cook were together on No. 1

(Deposition of J. C. Ridenour.)

Be*wlo* Discovery on the 23d day of March, 1905?

A. Yes, sir.

Q. That is the time Henry Cook asked you to stake this ground in the names of himself, yourself, A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk, and A. R. Armstrong?

A. Yes, sir.

Q. How long did Henry Cook stay there after the 23d day of March, 1905?

A. He came to town that day.

Q. Had anything been done at the time he left Dome Creek to come to town in the way of staking this ground? A. No, sir, nothing at that time.

Q. Did he state or represent to you at that time that he was the agent of those six persons named in the notice of location?

A. I don't think so; I don't remember now.

Q. You don't know whether he did or not ?

A. I couldn't say positively.

Q. When did you first go upon Dome Creek?

A. I went on to Dome Cre*k*k in January, 1905.

Q. What part of the creek did you go on at that time?

A. I was on Discovery, and No. 2 Above, and on Two, Three and Four benches.

Q. How long did you stay at that time?

A. Just a few hours.

Q. And when did you come back?

A. I came back the next day I passed over to Spruce Creek," etc. * * *

(Deposition of J. C. Ridenour.)

"Q. When did you come back to Dome Creek after that?

A. About the first of February the same year.

Q. What part of the creek did you go to then?

A. Two Above.

Q. And how long did you stay there then?

A. About two weeks.

Q. Did you stay on Two Above all the time?

A. No, sir." * * *

"Q. Then, you came back—you didn't come back again until the 22d of March?

A. The 22d of March.

Q. Who went with you to Dome Creek on the 22d of March? A. Who went with me?

Q. Yes.

A. I went over to the Dome Group to take the grub—

Q. Did you and Henry Cook make up your minds to go upon Dome Creek for the purpose of staking this ground on the 22d day of March?

A. We made up our minds to go to Dome Creek about the 19th or 20th of March, when we made arrangeents to go.

Q. Was Henry Cook with you in town at that time?

A. Yes, sir.

Q. Were you with him when the arrangements were made? A. Yes, sir."

Now, you read this: "Q. Was anybody else present during any of the conversation? * * *

A. No, sir.

Q. What was the arrangement at that time?

(Deposition of J. C. Ridenour.)

A. We made arrangements to go out there and stake.

Q. What were you to get for doing that?

A. We were to get our interest as members of the association.

Q. What proportion of the claim were you to get?

A. That would be an eighth apiece for Henry Cook and myself.

Q. It was agreed at that time you say between you and Henry Cook and Barnette that for going out and making the location of this association claim you were to get a one-eighth apiece? A. Yes, sir.

Q. You're positive of the arrangement made at that time? A. Yes, sir.

Q. And Henry Cook was present when that arrangement was made? A. Yes, sir.

Q. Did Henry Cook agree to that?

A. I think so.

Q. What *inters,* if any, was Captain Barnette to have in this association claim? A. I don't know.

Q. Was it arranged or agreed upon at that time between you three persons that Captain Barnette was to have any interest in this association claim to be located as the Dome Group?

A. No, sir, there was no arrangement.

Q. Was anything said at that time by anybody to the effect that Captain Barnette was to have a third interest in that location? A. No, sir." * * *

"Q. Sent out by Captain Barnette?

A. McGinn & Sullivan sent it along; I don't know whether he handed it to Captain Barnette or not.

(Deposition of J. C. Ridenour.)

Q. Captain Barnette sent the grub out did he?

A. Yes, sir.

Mr. McGINN.—The N. C. Company sent it out on the order of Captain Barnette?

A. I couldn't state whether he sent it out or whether it came through the N. C. Company, or how." And then on the bottom of page 12: "Q. Isn't it true that that notice was signed by P. D. Morrison as agent of those persons?

A. Not to my knowledge.

Q. Have you any knowledge at all about it?

A. Yes, sir.

Q. When did you see that notice last?

A. I saw the notice last September some time.

Q. September, 1905?

A. That was when I was last up and read it.

Q. Are you prepared to swear that it wasn't signed by P. D. Morrison as agent and attorney in fact for those eight names used as locators?

A. It was not signed with him as agent."

Mr. McGINN.—That's all.

Mr. JENNINGS.—If the Court please, I am now about to read a portion of the testimony of J. C. Ridenour, one of the defendants in this case which was delivered in open court in the case of Henry Cook, J. C. Ridenour, A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk and A. R. Armstrong against John Klonos, Henry Prigger, Neil McLeod, Henry Havery, James Gianakas, Gilbert McIntyre, Charles Lovett, Albert Anchors, H. M. Prosser, Nathan Zeimer, Richard Stafford, James

(Deposition of J. C. Ridenour.)

Osborne, H. K. Freeman, V. A. Green, T. E. Wooldridge and L. B. Anderson, and which is contained in the printed transcript of the record in cause No. 1510 in the United States Circuit Court of Appeals for the Ninth Circuit.

Defendants object to the testimony of J. C. Ridenour in that case being read to the jury, for the reason that in that suit Messrs. Barnette, McGinn or Sullivan were not parties to the action in any way, nor did they at that time have the right of cross-examination of the witness when he was upon the stand or at all; that the said Ridenour is present in court and can be called by the plaintiffs if they want to and the defendants can thereby have their right of cross-examination which they are deprived of in the record testimony as given upon the former hearing.

We further object to it, if it is intended to be offered as admissions against interest, because it is not binding on any of the other defendants in the action.

Objection overruled. Exception.

Mr. JENNINGS.—Page 189 of the printed record, testimony of J. C. Ridenour (reading):

[Excerpts from Testimony of J. C. Ridenour in Case No. 1510, U. S. S. C. A. (Read by Mr. Jennings).]

"Mr. McGINN.—You say you have been in Alaska for about six years? A. Yes, sir.

Q. And during that time you have been engaged in mining? A. Yes, sir.

(Testimony of J. C. Ridenour.)

Q. State whether or not you have staked claims.

A. Yes, sir, I have staked mining claims at various times.

Q. Do you know how the miners have located property in this country? A. Yes, sir." * * *

Mr. JENNINGS. — (Reading on page 211:) "Q. You have stated that you located this property in the name of Henry Cook, J. C. Ridenour, A. T. Armstrong, W. H. Sumner, Y. L. Newton, A. R. Armstrong, L. T. Selkirk, (M) N. E. Armstrong?

A. Yes, sir.

Q. What relations existed between you and Mr. Cook at that time, what business relations?

A. There had been no relations existing between us up till that time.

Q. At the time you located it?

A. We were partners.

Q. Where did you get the names of these people for whom you located?

A. Where did we get them?

Q. Yes, sir.

A. We got them from Captain Barnette."

(p. 213) "Q. What, if anything, at that time was said about names?

A. Captain Barnette said he would furnish us with the names.

Q. What else did he say, if anything?

A. I don't remember of anything else.

Q. Did he say anything about sending the names out to you? A. I don't remember that.

Q. He said he would furnish the names?

(Testimony of J. C. Ridenour.)

A. Yes, sir.

Q. And you say that on the 22d you received the names? A. Yes, sir.

Q. And then, you staked for them in their names and as you testified? A. Yes, sir.

Q. Who signed the names of these persons to the original location notice? A. I signed them.

Q. Who signed the notice of location that was recorded, if you remember?

A. I think that Henry Cook signed that, I don't know."

(p. 227) "Q. That list of names came out with some supplies that were sent out to you by Captain Barnette? A. Yes, sir.

Q. Up to that time you did not know in whose name or names this location was going to be made?

A. I did not know the six names, outside of Mr. Cook's and mine.

Q. Was that simply a list containing these six names, or was it a location certificate that was prepared and sent out with these supplies?

A. It was a prepared location notice.

Q. And that was the location notice that you posted afterwards upon your initial stake of this Dome Group? A. Yes, sir.

Q. And that location notice which you posted upon your initial stake was identical with the location notice which was afterwards recorded on the 17th of April, 1905, of this Dome Group?

A. Yes, it was identical, with the exception that the blanks that were in the notice when I received it I

(Testimony of J. C. Ridenour.)

filled out myself.

Q. What blanks were those?

A. The directions between the stakes."

(p. 288) "Q. Do you mean that the property was described and the stakes set out in that location notice and that all you did was simply give the direction from stake to stake, or do you mean that a description of the property—the description of the boundaries of it?

A. No, all I done was to take my directions and fill in the blanks, giving the directions between the stakes.

Q. On the notice that was sent out to you, did the number of stakes appear?

A. A number of blanks appeared with the number of stakes; there were more stakes appearing on the blanks than what I used.

Q. So that all the filling in that you did was to state the direction from stake to stake?

A. Yes, sir.

Q. The distances were contained in that notice that was sent out to you?

A. Yes, but I changed one of the distances from 660 feet to 330 feet.

Q. The number of the stakes from 1 down to 25 was contained in that notice?

A. Yes, there was; I think it called for 26 or 27. I do not remember.

Q. Was that a typewritten notice?

A. Yes, sir.

Q. Were the names of these eight locators type-

(Testimony of J. C. Ridenour.)

written upon this notice at that time? A. Yes, sir.

Q. Do you know who prepared that notice?

A. Mr. McGinn prepared it, I believe."

(p. 230) "Q. When Mr. Cook told you to locate or stake this claim, did he tell you what ground he wanted you to stake?

A. Yes, he told me what ground we had intended to take in."

(p. 247) "Q. Did you consult with Mr. Cook as to where number two shaft should be put down?

A. Yes, we talked about where we would sink number two.

Q. You and Mr. Cook? A. Yes, sir.

Q. When did you commence number two shaft?

A. On the 10th day of June, I believe, 1905.

Q. Do you know that part of the Dome Group location that is commonly called Four below, first tier, right limit? A. Yes, sir."

"Q. What interest in the Dome Group claim did you have at the time of this location?

A. A one-eighth.

Q. When did you get the remainder of your interest?

A. I do not remember the date when I did get the remainder.

Q. About when was it?

A. I think it was along in August of the same season, 1905.

Q. From whom did you get that?

A. From the other associates in the location.

Q. Did you get any deed for that? A. Yes, sir.

(Testimony of J. C. Ridenour.)

Q. From what other associates did you get this remainder of your one-sixth interest?

A. Armstrong—" and there is a dash there because there is an objection.

"Q. Who did you deal with with reference to getting your interests?

A. Captain Barnette gave us the interests.

Q. Who else had any interest in this Dome Group location at the time it was located, besides yourself?

A. Who else had an interest?

Q. Yes, at the time you located it?

A. Why, the parties named in the location notice.

Q. Anyone else?

A. Not to my knowledge." * * *

(p. 255) "Q. What interests did Henry Cook have in the location at the time it was made?

A. An equal interest, one-eighth, the same as I had.

Q. What interest has Henry Cook in the location at the present time? A. He owns a one-sixth.

Q. Who, besides you and Henry Cook, owns any interest in that claim at the present time?

A. The original locators.

Q. State who else has any interest.

A. The three Armstrongs, Sumner, Slekirk and Newton.

Q. Who besides those people?

A. Well, I don't know.

Q. Is there anyone else besides those?

A. Not to my knowledge, my personal knowledge, no.

(Testimony of J. C. Ridenour.)

Q. Do you know whether McGinn & Sullivan have any interest in that location?

A. I have never seen any deeds where they had an interest.

Q. Do you know whether they have any interest in that location? * * *

A. No, I don't know for sure.

Q. Do you know whether Captain Barnette has any interest in that location? A. No, sir.

Q. You don't know? A. No.

Q. Did you see any stakes of any other mining claims"—I don't suppose I ought to read that under the Court's ruling. That's all I care to read of Mr. Ridenour's testimony.

[Excerpts from Testimony of J. C. Ridenour in Case No. 1510 U. S. C. C. A. (Read by Mr. McGinn).]

(DEFENDANTS' EXTRACTS FROM RIDENOUR TESTIMONY IN # 278.)

Mr. McGINN.—(Reading from p. 212:) Speaking about this location I asked the question: "Where did you get the names of those people for whom you located?

Q. Where did I get them?

Q. Yes, sir.

A. We got them from Captain Barnette.

Q. Where did you get them?

A. Where did I get them?

Q. Yes?

A. I got them on the 22d day of March in our supplies. They came along in a bunch of supplies that we had.

(Testimony of J. C. Ridenour.)

Q. Prior to that time had you spoken to Captain Barnette about it? A. I don't believe that I had.

Q. Had you spoken to him about this Dome Group Claim, about staking this property out there?

A. Yes, I had spoken about it a little."

(p. 226) "Q. Mr. Ridenour, you testified yesterday that the list of names which you used as locators of this property was sent out to you by Captain Barnette? A. Yes, sir.

Q. And they got out there on the 22d of March, 1905? A. Yes, sir.

Q. In a box of grub that was sent out?" There don't seem to be any answer to that.

"Q. That list of names came out with some supplies that were sent to you by Captain Barnette?

A. Yes, sir." Then, you ask about this notice you ask this question on the same page, page 227: "Q. And that location notice which you posted upon your initial stake was identical with the location notice which was afterwards recorded on the 17th of April, 1905, of this Dome Group?

A. Yes, it was identical with the exception that the blanks that were in the notice when I received it I filled out myself.

Q. What blanks were those?

A. The directions between the stakes.

By the COURT.—Do you mean the directions or the description of the property?

A. The directions according to the compass between the stakes."

Mr. McGINN.—Now, on page 230: "Q. In stak-

(Testimony of J. C. Ridenour.)

ing this claim did you simply follow the instructions contained in this location notice or did you choose the ground yourself?

A. I followed the instructions mostly. I choosed a little of the ground myself.

Q. Did you select the place where to put the initial stake? A. Yes, sir.

Q. Nothing had been said to you by Mr. Cook or by Captain Barnette as to where the initial stake of the claim was put?

A. Well, I cannot remember whether Mr. Cook said anything about where to set it or not.

Q. When Mr. Cook told you to locate or stake this claim, did he tell you what ground he wanted to stake?

A. Yes, he did tell me what ground we had intended to take in."

Mr. McGINN.—Now, on page 284: "Q. You said you received a deed of your one-third interest signed by Mr. Barnette. When was that deed given? * * *

A. When was the deed delivered?

Q. Delivered to you; yes.

A. I don't remember the date it was delivered.

Q. Can you tell us about?

A. I think it was some time in September or August, 1905; that is my impression, I don't know.

Q. That was a full one-third interest? * * * Have you got that deed with you?

A. No, sir, I have not.

Q. Where is it?

(Testimony of J. C. Ridenour.)

A. I don't know whether it is in the vault or not."

(p. 287) "Q. You said in August or September, 1905, that that agreement was entered into, that that deed was given to you?" The witness doesn't answer that.

"Q. You are quite positive between those two months, are you? A. No, sir; I am not.

Q. Can you be positive within a certain date, if it is not within those two months?

A. Within a certain date?

Q. Yes. Can you give us any other date. Can you be positive between August, 1905, and January, 1906, for instance? * * *

A. No, I couldn't be positive."

By Mr. JENNINGS.—I will now offer the testimony of E. T. Barnette taken in the same case, and under the same circumstances as the testimony of J. C. Ridenour which I have just read.

Mr. McGINN.—To which we object on the same grounds assigned to the testimony of J. C. Ridenour.

Objection overruled. Exception. I don't suppose there will be any need of repeating the specific objection?

The COURT.—No; it may go to all of this testimony, and the objection will be overruled, and exception allowed.

Mr. JENNINGS.—(Reading from printed record, p. 333.)

(Plaintiffs' Extract from Testimony of Barnette in #278 D. C. A. being #1510 C. C. A.)

[Excerpts from Testimony of E. T. Barnette in Case No. 1510, U. S. C. C. A. (Read by Mr. Jennings).]

"Direct Examination.

(By Mr. McGINN.)

Q. What is your name? A. E. T. Barnette.

Q. You reside in the Fairbanks Recording District? A. I do.

Q. How long have you resided here?

A. Since 1901.

Q. Are you acquainted with Arabella R. Armstrong? A. Arabella Armstrong; yes, sir.

Q. How long have you known her?

A. About four years.

Q. I will ask you if you ever received a power of attorney from her? A. Yes, sir.

Q. I will ask you to examine this power of attorney marked Plaintiffs' Exhibit 3, and state whether or not that is the power of attorney that you received. A. (After examining same.) It is."

Mr. JENNINGS.—Now, that isn't introduced yet.

Mr. McGINN.—Now, I think we might as well get those exhibits; have you got the exhibits introduced in that case, Mr. Clerk?

Mr. JENNINGS.—They are all printed in the record * * * I *I* submit that this part of Mr. Barnette's testimony, the exhibits are just as much a part of his testimony as the oral part.

The COURT.—I think so, Mr. McGinn; when you get to your case if you wish the original exhibits you may offer them.

Mr. JENNINGS.— * * * They are set forth here in this bill of exceptions. "A. (After examining it.) It is." Now, Plaintiffs' Exhibit No. 3 as referred to there is found on page 307 of the printed Record, and reads as follows:

[Plaintiffs' Exhibit No. 3 in Case No. 1510, U. S. C. C. A.]

"KNOW ALL MEN BY THESE PRESENTS: That I, Arabella R. Armstrong, of the City of Akron, County of Summit and State of Ohio, do hereby constitute and appoint E. T. Barnette, of Dawson City, Alaska, my attorney, for me and in my name to locate, enter and take up mining claims and other land in Alaska, and to do all that is necessary to be done to acquire the right and title to any mining claims or land in Alaska, and also to sell and dispose of any such mining claims or land that may be so taken up, entered, or located, and to execute and deliver all necessary deeds of conveyance or other papers necessary to convey my right or title to the same, upon such terms as he shall think fit. Hereby ratifying and confirming all that my said attorney shall do in the premises, the same as if I were personally present and did the same.

IN WITNESS WHEREOF I have hereunto set my hand and seal, this 7th day of July, A. D. 1900, at Akron, Summit County, Ohio.

ARABELLA R. ARMSTRONG. [Seal]

Witness: J. A. BRADLEY.

A. T. ARMSTRONG.

Duly acknowledged, certified and stamped.

(Testimony of E. T. Barnette.)

[Endorsed]: No. 278. In the District Court, Territory of Alaska, Third Division. Cook et al. vs. Klonos et al. Plaintiffs' Exhibit No. 3. Filed in the District Court, Territory of Alaska, 3rd Division. Apr. 26, 1907. E. J. Stier, Clerk. By E. A. Henderson, Deputy."

A. (After examining the same.) It is.

Q. I will ask you if you ever executed on behalf of Arabella Armstrong a deed to J. C. Ridenour and Henry Cook? (Handing witness Plaintiffs' Exhibit No. 9.) A. Yes, sir.

Q. How did you sign her name to that deed?

A. As agent."

Mr. JENNINGS.—I don't see where that is introduced—O, yes. It is Plaintiffs' Exhibit No. 9. Now, Plaintiffs' Exhibit No. 9 is found on page 324 (of the printed record) and reads as follows:

[Plaintiffs' Exhibit No. 9 in Case No. 1510, U. S. C. C. A.]

THIS INDENTURE Made and entered into this 30th day of April, A. D., 1906, by and between A. T. Armstrong, W. R. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk and A. R. Armstrong, parties of the first part by and through E. T. Barnett, their attorney in fact, and Henry Cook and J. C. Ridenour, the parties of the second part,

WITNESSETH: That the said parties of the first part, for and in consideration of the work and labor done and performed by the said parties of the second part in sinking certain holes and shafts and running

drifts upon the property hereinafter described, and the sum of one dollar to them in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, do hereby by these presents, grant, bargain, sell and convey unto the said parties of the second part, their heirs and assigns, an undivided one-twelfth (1/12) interest in and to that certain association placer mining claim situated on the right limit of Dome Creek in the Fairbanks Recording District, Territory of Alaska, and more particularly described as follows, to wit:

THE DOME GROUP, The initial stake of which said claim is placed at the west side of said claim and near the side line of creek claim number one (1) below discovery on Dome Creek. Said ground adjoins creek claims numbered one (1) two (2), three (3), four (4) and five (5) below Discovery on said creek. The location notice of which said Dome Group was filed for record in the office of the recorder of the Fairbanks Recording District, Territory of Alaska, upon the 17th day of April, 1905, and is recorded in Volume 5, page 458 of Location Notices, reference to which is hereby made for a more particular description of the property herein conveyed.

TO HAVE AND TO HOLD unto the said parties of the second part, their heirs and assigns forever, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining.

IN WITNESS WHEREOF the parties of the first

(Testimony of E. T. Barnette.)

part have hereunto set their hands and seals this the day and year hereinabove written.

A. T. ANDERSON (ARMSTRONG) [Seal]
W. R. SUMNER, [Seal]
Y. L. NEWTON, [Seal]
M. E. ARMSTRONG, [Seal]
L. T. SLEKIRK, [Seal]
A. R. ARMSTRONG, [Seal]

By E. T. BARNETTE,
Their Attorney in Fact.

Signed, sealed and delivered in presence of:
JOHN L. McGINN.
M. L. SULLIVAN.

Properly acknowledged, certified and stamped.

[Endorsed]: No. 278. In the District Court, Territory of Alaska, Third Division. Cook et al. vs. Klonos et al. Deed—A. T. Armstrong, W. R. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk and A. R. Armstrong, by E. T. Barnette, Their Attorney in Fact, to Henry Cook and J. C. Ridenour. Plaintiffs' Exhibit No. 9. Filed in the District Court, Territory of Alaska, 3rd Division. Apr. 26, 1907. E. J. Stier, Clerk. By E. A. Henderson, Deputy."

(p. 334) "Q. How did you sign her name to that deed? A. As agent. * * *

Q. Is A. R. Armstrong the same person who is called Arabella Armstrong in this power of attorney marked Plaintiffs' Exhibit 3? A. Yes, sir.

Q. The same person? A. The same person. * * *

(Testimony of E. T. Barnette.)

Q. Are you acquainted with Yuba L. Newton?

A. I am.

Q. How long have you known her?

A. Ever since she has been born.

Q. Did you ever receive a power of attorney from her? A. I did.

Q. When did you receive the power of attorney?

A. I think it was in 1900.

Q. I will ask you to examine Plaintiffs' Exhibit 4 and state whether or not that is the power of attorney you received from her (handing it to witness).

A. It is.

Q. Did you execute a deed on her behalf to Henry Cook and J. C. Ridenour? A. I did.

Q. I will ask you to examine Plaintiffs' Exhibit 9 and state whether or not that is the deed.

A. (After examining Plaintiffs' Exhibit 9.) It is."

Mr. JENNINGS.—Now, that power of attorney No. 4; I see that Exhibit No. 4 is a power of attorney from Yuba L. Newton to E. T. Barnette, found on page 310 of the record.

Mr. McGINN.—Well, now, it is practically the same as the other; you needn't read it to get it into the record.

Mr. JENNINGS.—Well, if the Court please, I think I will read it; I don't propose to read them all, but there are two that are separate and the rest are all joined in one.

Mr. McGINN.—No, they are all separate.

(Testimony of E. T. Barnette.)

Mr. JENNINGS.—Separate powers of attorney from each?

Mr. McGINN.—Yes, sir.

Mr. JENNINGS.—Well, I guess that's right, gentlemen; it is the same date and the same acknowledgement, or practically the same acknowledgement.

Mr. McGINN.—Yes, they are practically the same; they are properly acknowledged, you can see that—and witnessed. They may be considered introduced as far as that's concerned, all of these exhibits; there is no need of taking the time of the jury to read them.

The COURT.—Very well.

(p. 336) "A. (After examining Plaintiff's Exhibit 9.) It is. * * *

By the COURT.—Q. You said you had known Yuba L. Newton since she was born. That is indefinite. We don't know when she was born.

A. I don't remember. She is about 27 years old, I should judge. She is my sister's daughter.

(By Mr. McGINN.)

Q. Are you acquainted with Martha E. Armstrong? A. I am.

Q. How long have you been acquainted with her?

A. About 30-odd years.

Q. Did you ever receive a power of attorney from her? A. I did.

Q. When? A. In 1900.

Q. I will ask you to examine Plaintiffs' Exhibit 5 and state whether or not that is the power of attorney you received from her?

A. (After examination.) It is.

(Testimony of E. T. Barnette.)

Q. I will ask you now, whether or not, on her behalf, you ever executed a deed to Henry Cook and J. C. Ridenour? A. Yes, sir.

Q. How did you sign her name to that deed?

A. 'M. E. Armstrong, by E. T. Barnette, attorney in fact.'

Q. Plaintiffs' Exhibit 9 is that deed?

A. Yes, sir.

Q. Is Martha E. Armstrong related to you in any way? A. My sister.

Q. Are you acquainted with Lucia T. Selkirk?

A. I have met her.

Q. When did you meet her?

A. About 8 years ago.

Q. Did you ever receive a power of attorney from her? A. I did.

Q. When? A. 1900.

Q. Examine Plaintiffs' Exhibit 6 and state whether or not that is the power of attorney that you received from her.

A. (After examination of Plaintiffs' Exhibit 6.) It is.

Q. Referring to Plaintiffs' Exhibit 6, state whether or not you ever, on her behalf, executed a deed to Henry Cook and J. C. Ridenour. A. I did.

Q. Did you sign her name? (Witness examines Plaintiffs' Exhibit 9.)

A. 'L. T. Selkirk, by E. T. Barnette, attorney in fact.'

Q. By 'L. T. Selkirk' you meant Lucia T. Selkirk?

A. I did.''

(Testimony of E. T. Barnette.)

(Said Exhibit "6" same as exhibit 9 as to signature.)

(p. 339.) "Q. Are you acquainted with Wilbur H. Sumner? A. I am.

Q. How long have you known him?

A. About 28 years.

Q. Did you ever receive a power of attorney from him? A. Yes, sir.

Q. What year? A. 1900.

Q. I ask you to examine Plaintiffs' Exhibit 7 and state whether or not that is the power of attorney that you received at that time. A. It is."

(p. 340) "Q. Did you, on his behalf, ever execute a deed in favor of J. C. Ridenour and Henry Cook?

A. I did.

Q. Plaintiffs' Exhibit 9 is the deed you executed on his behalf? A. Yes, sir.

Q. How did you sign the name of Wilbur H. Sumner to that deed?

A. I signed it here 'W. R. Sumner' but it should have been 'W. H. Sumner.'

Q. Are you related to Wilbur H. Sumner in any way? A. He is my brother in law.

Q. You signed it W. H. Sumner, by you as attorney in fact? A. Yes, sir.

The COURT.—He signed it W. R. Sumner. * * *

A. Yes, sir, it is a mistake of mine; it should have been an 'H.'

Q. Are you acquainted with Allen T. Armstrong?

A. I am.

Q. Did you receive a power of attorney from him?

(Testimony of E. T. Barnette.)

A. I did.

Q. What year? A. 1900.

Q. I will ask you to examine Plaintiffs' Exhibit 8 and state whether or not that is the power of attorney that you received.

A. (After examination of document.) Yes, it is the same."

(p. 340) "Q. Did you, on his behalf, ever execute a deed to J. C. Ridenour and Henry Cook?

A. I did.

Q. Refer to Plaintiffs' Exhibit 9 and state whether or not that is the deed.

A. (After examining Plaintiffs' Exhibit 9.) It is the same.

Q. How did you sign his name to that instrument?

A. A. T. Armstrong.

Q. By whom?

A. By E. T. Barnette, attorney in fact.

Q. Did you execute it by virtue of this power of attorney? A. I did. * * *

Q. What relation, if any, is Allen T. Armstrong to you? A. My brother in law.

Q. And Lucia Selkirk?

A. She is a relative of A. T. Armstrong. * * *

Q. You are still the agent of these persons are you, Captain? A. I am."

Mr. JENNINGS.—Now, on page 343:

"Cross-examination by Mr. COUSBY.

Q. You were living in Dawson in the Yukon Territory when you procured these six powers of attorney to be sent to you? A. Yes, sir, I was.

(Testimony of E. T. Barnette.)

Q. Had you any intention at that time of coming down into the District of Alaska?

A. Yes, sir, they were sent to me for that purpose.

Q. They were sent to you for the purpose of being used in the District of Alaska? A. Yes, sir.

Q. When did you leave Dawson for Alaska?

A. I left Dawson, I think, it was in the fall of 1900. * * *

Q. How long has it been since you have seen Arabella R. Armstrong?

A. About seven years, between 7 and 8 years.

Q. Since you have seen her? A. Yes, sir.

Q. Where was she living at the time?

A. Akron, Ohio.

Q. Did you receive this power of attorney which purports to be from her directly from her at that time?

A. No, it was sent to my brother in law A. T. Armstrong." * * *

(p. 345) "Q. Do you know where Arabella Armstrong was on the 24th of March, 1905?

A. No, sir." * * *

(p. 346) "Q. Did you know whether Arabella R. Armstrong was living on the 24th day of March, 1905? * * * A. Yes, sir.

Q. How do you know that?

The COURT.—You want to know whether she was or was not?

Mr. COUSBY.—I ask him to state whether she was living or dead.

(Testimony of E. T. Barnette.)

A. She was living then and is now to the best of my knowledge.

Q. Have you got any knowledge on the subject at all?

A. She was living when I left Seattle to come in here. * * *

Q. How do you know she was?

A. By talking with my brother in law A. T. Armstrong.

Q. All you know about it is what A. T. Armstrong your brother told you? A. My brother in law.

By the COURT.—You say that is all you know about it?

A. Yes, sir, that is all I know about it. * * *

(p. 349) "Q. Whom did you authorise Cook and Ridenour to stake this Dome Group Claim for in the spring of 1905?

A. I gave them the names of the six powers of attorney that have been shown here.

Q. Was there any agreement at that time between you and Cook and Ridenour as to the ownership of the claim? A. There was an understanding.

Q. Where did that understanding take place?

A. At the Bank of the Fairbanks Banking Company.

Q. About what date was that?

A. Some time in March.

Q. March of 1905? A. 1905.

Q. That was before this location was made?

A. Yes, sir. * * *

Q. Was there an understanding that anybody be-

(Testimony of E. T. Barnette.)

sides Cook and Ridenour should have any interest in that Group?

A. The parties that I gave them the names of would have an interest.

Q. Besides those parties and Cook and Ridenour, who else were to have any interest in the Group?

A. No one.

Q. Are you positive of that? A. I am. * * *

Q. I will ask for the deposition of Captain Barnette that was filed in this case (to Clerk). (Clerk hands deposition to Mr. Cousby, who hands it to Captain Barnette, the witness.) State whether that is your signature. A. That is my signature.

Q. I will ask you if when your deposition was taken on the 30th day of June, 1906, the following questions were asked you and you made the following answers (reading): 'Q. Did you enter into any agreement with McGinn & Sullivan with regard to giving them any interest in this property on behalf of these plaintiffs?' "

Objected to as misleading, and repetition, and it cannot be used for the purpose of impeachment because he states there that it was some time in the month of April, that's the best of his recollection; he said he didn't know but it was after the location was made about the time suit was brought that the arrangement was made with McGinn & Sullivan. Of course he states prior to that there was absolutely no arrangement. The question is: "Was it understood or agreed at that time at your Bank that McGinn & Sullivan were to have any interest in that group?"

(Testimony of E. T. Barnette.)

and the answer is "No, sir." Then he introduces the deposition and asks (repeating question objected to).

" 'A. Yes, sir.' " * * *

" 'Q. About what time was that agreement made and what were the terms of it? * * *

A. It was about the time that I made arrangements with Cook and Ridenour to sink those two holes.

Q. What was that agreement that was made with them?

A. McGinn & Sullivan were to get a one-third interest in the group.

Q. What for?

A. For looking after the litigation and protecting the property.' State whether you made those answers to those questions at that time. A. I did.

Q. I will ask you to state whether you also made the following answers to the following questions at that time: (Reads from said deposition:) 'Q. You put a boiler on the Dome Group Claim early in April?

A. I don't remember just when it was that they went out there to go to work. I bought them a boiler and an outfit.

Q. You sent it out to be worked on the Dome Group Claim? A. Yes, sir.

Q. What interest were you to get for doing that?

A. I was figuring on a half interest from the people I represented.

Q. Did you have any agreement with any of them to that effect?

A. I think I explained that agreement to you before.

(Testimony of E. T. Barnette.)

Q. State whether you have had any agreement to that effect?

(Objections.)

A. The only agreement was the letter that I wrote to my brother in law and I told you two or three times what that was.

Q. So you considered it understood when you sent out the boiler in April, 1905, that you were to get half of the interests of A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk, L. T. Armstrong? (A. R.)

A. When I received the powers of attorney I supposed they took it for granted, according to the letter I wrote my brother in law, that I was to have a half interest from them.

Q. I ask that the question be answered.

A. I certainly did expect a half interest in their interests.

Q. It was the only compensation which you were to get for sending the boiler out? A. Yes.' I will ask you to state whether you made those answers to those questions at that time?

A. I did.

Q. What interest, if any, do you own or claim to own in the Dome Group at the present time?

A. Only just the same as when that deposition was taken.

Q. You claim to own at the present time an undivided one-half of the interests of A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk and A. R. Armstrong?

(Testimony of E. T. Barnette.)

A. I expect to get a half interest.

Q. And do you claim to own a half interest in their interests?

A. No, I don't claim it, but I expect it.

Q. What do you mean when you say that you don't claim it?

A. I sent for the powers of attorney and told them I would stake for them and would expect a half interest, but I never had any agreement with them.

Q. You had an understanding to that effect?

A. No, sir, I have never had any understanding to that effect.

Q. Didn't you testify on the taking of your deposition that you had an understanding to that effect?

A. Only what was in the letter that I wrote to my brother in law.

Q. And you were figuring at that time on a half interest from the people you represented?

A. I expected to get a half interest from them.

Q. You do expect to? A. Yes, sir.

Q. And you did expect to at that time?

A. At the time I gave the names to Mr. Cook and Mr. Ridenour I expected that if they staked for them I would get a half interest from them according to the letter I wrote to my brother in law, I had no agreement with them.

Q. And you always have expected ever since this letter was written by you after you received the powers of attorney? A. Yes, I do now.

Q. At the time you received those powers of attorney or at the time you sent for them you stated

(Testimony of E. T. Barnette.)

in the letter that you expected to have a half interest for yourself in any interests acquired under the powers of attorney?

A. I said that I would stake for them and any properties that were acquired I would expect a half interest for looking after them, staking, &c.

Q. And in response to that communication you received the powers of attorney?

A. I received the powers of attorney.

Q. And there never has been any different arrangement or understanding between you and those six people mentioned than the one that you were to have a half of their interest?

A. I never had any that I was to have half of their interests.

Q. You never had that understanding?

A. No, sir.

Q. I will ask you if you didn't make the following answers to the following questions at the time your deposition was taken in July, 1906, page 2 (reads): 'Is there any understanding or agreement of any kind between you and any persons whomsoever to the effect that you are to have any estate, right, title or interest whatever in the Dome Group Claim situate on the right limit of Dome Creek below discovery in the Fairbanks Mining District, or any part or portion of it? A. Yes, sir.' Did you make that answer to that question at that time?

A. I expect I did.

Q. (By Mr. COUSBY who continues reading:) 'Just state in substance what that understanding or agreement is.

(Testimony of E. T. Barnette.)

A. There is no understanding. The only thing is I wrote to my brother in law for his power of attorney and some of my folks.' State whether you made that answer to that question at that time.

A. I think I did.

Q. And do you now deny that there was ever any understanding?''

Mr. JENNINGS.—That don't seem to be answered.

Mr. McGINN.—I think what occurred there should be read.

Mr. JENNINGS.—All right. "And do you now deny that there was ever any understanding?

Mr. McGINN.—We object to that; the witness hasn't denied that. He has answered the same thing three or four times.

The COURT.—I think the objection is well taken.

Mr. COUSBY.—I take an exception.

Mr. STEVENS and Mr. de JOURNEL.—We take an exception.

By Mr. COUSBY.—I will ask you to state whether at that time you also made the following answers to the following questions, page 4 (reads): " 'Q. Was there any understanding or agreement between you and any other person either at that time or at any subsequent time that you were to have any interest in any mining claims or locations which you located or caused to be located for any of those persons under any of those powers of attorney?

A. Yes, sir, at the time I wrote my brother in law this letter I stated that if opportunity came up

(Testimony of E. T. Barnette.)

I would stake ground for them as their agent and would expect half for staking.' State whether you made that answer to that question at that time?

A. Yes, sir; that was the only agreement that there is between us.

Q. State whether you ever advised or informed either A. T. Armstrong, W. H. Sumner, Y. L. Newton, L. T. Selkirk, M. E. Armstrong or A. R. Armstrong that the Dome Group location had been made by you as their agent and that they were locators or had any interest in that location.

A. Last winter when I was back East I advised and talked the matter over with W. H. Sumner, Y. L. Newton, and A. T. Armstrong and M. E. Armstrong; with L. T. Selkirk and A. R. Armstrong I did not.

Q. Upon what date in the winter did you advise those three persons that you had located this claim?

A. Four persons. It was some time in October that I had the conversation with W. H. Sumner and Y. L. Newton. * * *

Q. I will ask you to state, Mr. Barnette, whether these six powers of attorney marked from 3 to 8 in this case are the same powers of attorney which you referred to at the time your deposition was taken last June? A. They are the same.

(p. 366) "Q. Are all of the six persons represented by you by these powers of attorney related to you either by consanguinity or affinity?

A. W. H. Sumner is my brother in law, Y. L. Newton is my niece, A. T. Armstrong is my brother

(Testimony of E. T. Barnette.)

in law, M. E. Armstrong is my sister, they are the only ones that are related to me.

Q. Then, the other two are not related to you?

A. A. R. Armstrong is the sister of A. T. Armstrong.

Q. She would be a sister in law by marriage?

A. I give it up.

Q. She is the sister in law of your brother in law?

A. Yes. * * *

Q. Who has furnished the money for the development of this Dome Group so far as it has been developed in the interests of J. C. Ridenour and his associates? A. I have furnished most of it.

Q. Who else besides yourself has furnished any of the money?

A. No one that I know of. Possibly Cook and Ridenour use some of their money; I don't know.

Q. If they have furnished any money it would be a very small portion? A. Yes, sir.

Q. Of the total, wouldn't it? A. Yes, sir.

Q. Then, you have furnished substantially all the money? A. Yes, sir.

Q. That has been put in the ground? A. Yes.

The COURT.—Do you desire to read any portion of the testimony of Captain Barnette, Mr. McGinn?

Mr. McGINN.—Yes, I desire to read some portions of it.

Mr. McGINN.—Now, at the bottom of page 334. (Reading from printed record in #1510 C. C. A.:)

[Excerpts from Testimony of E. T. Barnette in Case No. 1510, U. S. C. C. A. (Read by Mr. McGinn).]

"By the COURT.—How did you sign her name, not how you executed it, but how did you sign her name to the deed? * * *

A. A. R. Armstrong, by E. T. Barnette, attorney in fact."

(p. 341) "Q. And J. C. Ridenour and Henry Cook, to whom you executed this deed, are some of the plaintiffs in this case, are they? A. They are.

Q. How long have you known Mr. Cook?

A. Since the spring of 1905.

Q. How long have you known J. C. Ridenour?

A. I met him at the same time. No, I think I met him a few days later.

Q. Did you ever at any time, on behalf of the persons whose names I have just stated to you and whose names are included within the powers of attorney that we have just specified, authorised them to stake property for those persons? A. Yes, sir, I did.

Q. About what time was that?

A. That was in the spring of 1905.

Q. You are still the agent of these persons are you, Captain? A. I am. * * *

Q. How long have you been agent for these people by virtue of these powers of attorney?

A. Since I received them, I suppose. * * *

The COURT.—What do you mean by that? Do you mean that the powers of attorney have never been revoved? (To Mr. McGinn.)

A. (By WITNESS.) Never been revoked, no. I

(Testimony of E. T. Barnette.)

didn't know but what by answering that, that I would have to stake before becoming their agent; stake ground for them before becoming their agent.

The COURT.—The powers of attorney never have been revoked?

A. They never have.

Q. You were acting as their agent in the years 1905 and 1906? A. Yes, sir.

Q. Under and by virtue of the powers of attorney that have been shown you? A. I have. * * *

Q. Did you ever hear directly from Arabella R. Armstrong since you have been in the Dawson or Yukon country? A. Yes, sir."

(p. 349.) "Q. Whom did you authorise Cook and Ridenour to stake this Dome Group Claim for in the spring of 1905?

A. I gave them the names of the six powers of attorney that have been shown here."

(p. 350) "Q. Was there an understanding that anybody besides Cook and Ridenour should have any interest in that group?

A. The parties that I gave them the names of would have an interest.

Q. Besides those parties and Cook and Ridenour, who else were to have any interest in the group?

A. No one.

Q. Are you positive of that? A. I am.

Q. Was it understood or agreed at that time at your bank that McGinn & Sullivan were to have any interest in that group? A. No, sir."

(p. 352) "Q. What was the agreement that was

(Testimony of E. T. Barnette.)

made with them?

A. McGinn & Sullivan were to get a one-third interest in the group.

Q. What for?

A. For looking after the litigation and protecting the property."

"Q. Did you advise them at that time that a suit had been brought in their names to recover any interest in this claim?

A. I told them the ground was in litigation."

Now, at the bottom of page 361: "Q. I believe you stated on your direct examination that the plaintiff Newton you saw and had a personal interview with last winter? A. Last October.

Q. What is the first name of Newton? A. Y. L.

Q. That is a man? A. No, sir.

Q. That is a woman? A. Yes, sir.

Q. Did you acquire any part of her interest in this property? A. No, sir.

Q. Did you acquire any part of her interest in this property? A. No, sir, * * *

Q. Did you see M. E. Armstrong last winter, or while you were out?

A. No, I saw her this spring just before I came in.

Q. Where? A. Gold Bar, Washington.

Q. Did you acquire any of her interest in this property?" No answer.

(p. 363) "You saw A. T. Armstrong, did you?

A. Yes, sir.

Q. When was the last time you saw A. T. Armstrong? A. Just before I came in here.

(Testimony of E. T. Barnette.)

Q. Where does he live?

A. At Gold Bar, Washington. * * *

Q. Have you ever acquired by deed or otherwise any interest in what is known as the Dome Group of the plaintiff A. T. Armstrong?

A. No, sir. * * *

Q. You saw W. H. Sumner? A. Yes, sir.

Q. Since the institution of this suit?

A. Yes, sir.

Q. Do you know W. R. Sumner? A. No, sir.

Q. Have you had any power of attorney from W. R. Sumner?

A. No, sir. I don't know any such persons.

Q. But you do know W. H. Sumner?

A. Yes, sir. * * *

Q. Did you ever acquire any of his interest or his claim of interest in this property? A. No, sir.

Q. Where does he live? A. Medina, Ohio.

Q. When did you see him last? A. In October.

Q. Last October? A. Yes, sir."

Mr. McGINN.—That's all.

Plaintiffs rest.

[Recital Re Motion for Instructed Verdict and for Nonsuit.]

Defendants then made motion for instructed verdicts and for nonsuit, which motions were by the Court overru*ld*. Defendants except.

Defense's Evidence.

[Testimony of J. C. Ridenour, Defendant, in His Own Behalf, and on Behalf of Codefendants.]

J. C. RIDENOUR, one of the defendants, being called in his own behalf and on behalf of his codefendants, and being thereto first duly sworn, testified as follows, on

Direct Examination.

By Mr. McGINN.—What is your name?

A. J. C. Ridenour.

Q. What is your occupation? A. Miner.

Q. How long have you resided in Alaska?

A. Nine years.

Q. What state did you come from? A. Kansas.

Q. What have you been engaged in doing since being in Alaska? A. Mining.

Q. When did you come to the Fairbanks Recording District of Alaska?

A. I came to Fairbanks Recording District of Alaska, in the spring of 1904; I was here once before.

Q. What creeks were you on during that year?

A. Goldstream.

Q. Where on Goldstream? A. No. 5.

Q. Are you acquainted with Dome Creek, in this recording district? A. I am.

Q. When did you first go there?

A. January, 1905.

Q. How long did you continue to stay there subsequent to that time?

(Testimony of J. C. Ridenour.)

A. I was there about three days that trip, three consecutive days.

Q. Then, when did you next return there?

A. About the fore part of February, I think.

Q. How long did you stay there then?

A. A couple of weeks.

Q. Where were you at that time, on Dome Creek?

A. Two Above.

Q. What were you doing? A. Prospecting.

Q. Then, when did you return to Dome, if at all?

A. I think I was on Dome for one trip some time the fore part of March.

Q. Fore part of March? A. Yes.

Q. Then, when were you next there?

A. The 22d of March.

Q. Are you acquainted with Henry Cook?

A. I am.

Q. When did you get acquainted with him?

A. I got acquainted with him to know who he was in February, 1905.

Q. 1905?

A. To know his name—I had met him before.

Q. You met him there where?

A. I had met him before.

Q. Where did you meet him?

A. I met him once on Fish Creek, and he had worked on the telephone line the same time I did but I didn't know him, in 1904.

Q. You both worked for the Telephone Company?

A. Yes, sir.

Q. Did you see Henry Cook in 1905, in February

(Testimony of J. C. Ridenour.)

or March? A. Yes.

Q. Where did you see him?

A. Well, he was working on No. 3 Above Dome, the same time I was on Two.

Q. What was he doing there? A. Prospecting.

Q. Do you know the property situate on Dome Creek known as the Dome Group? A. I do.

Q. Did you ever have anything to do with that property? A. I did—I located it.

Q. Just state what you did, Mr. Ridenour.

A. The 23d of March I put out an initial stake.

Q. Where "out" where did you put it?

A. Opposite the lower end of Creek Claim No. 1 below, Dome Creek.

Q. Below what on Dome Creek?

A. Discovery.

Q. Discovery is a well-known claim on Dome Creek, is it?

A. Discovery was a fairly well-known claim at that time.

Q. And No. 1 below? A. The same.

Q. You placed *you* stake you say, near the lower end of No. 1 below, Creek Claim?

A. Yes, sir, right limit.

Q. How does Dome Creek run?

A. Dome Creek runs in a northerly direction, a little to the west.

Q. And to the right would be the east side and to the left the west side? A. Yes, sir.

Q. And you placed it on the east side near Creek Claim No. 1? A. Yes, sir.

(Testimony of J. C. Ridenour.)

Witness Ridenour then testified that on the 23d and 24th of March, 1905, he staked the Dome Group Association Claim, that being the claim described in the first affirmative defence of the answer, by putting out twenty-six (26) stakes and well blazing the lines between *between* said stakes, posting notices, and otherwise marking the limits of the said association claim on the ground so that the boundaries thereof could be readily traced.

Q. Did you post a notice, Mr. Ridenour?

A. I did.

Q. When did you do that?

A. I posted the final notice March 24th.

Q. Where did you post it?

A. On my initial stake, opposite the lower end of One.

Q. And how did you post it—what kind of a notice, was it? A. It was a printed notice.

Q. What do you mean by a printed notice?

A. A notice probably printed on a typewriter.

Q. You mean a typewritten notice?

A. Typewritten notice, yes.

Q. And who had—how many names were upon the notice, was it signed up?

A. Well, the notice came to me in blank form, and I filled out the notice and nailed it into the bottom I think of a candle box, and nailed it on the stake.

Q. Well, I'll ask you whether this notice of location is similar to the notice, or something similar, to the notice that you posted there at that time?

A. (Examining paper received from counsel.)

(Testimony of J. C. Ridenour.)

Yes, sir, this is similar.

Q. You placed a notice similar to this—

A. Upon the initial stake.

Q. Upon the initial stake; and you say you tacked it to the bottom of a candle box?

A. Yes, on the inside of the box with the top off.

Q. And what did you do with the box?

A. Nailed it onto the stake.

Q. I'll ask you to state whether it is still standing there.

A. The last time I saw it it was still there.

Q. When was that?

A. That would be some time the summer of 1908; it was covered up with tailings at that time—being covered up.

Q. It was being covered up at that time—was it there in September, 1905? A. It was.

Q. How near was that—was there a cabin there near that initial stake?

A. Yes, about a hundred feet, I think; something like that.

Q. A hundred feet. I'll ask you to state whether there was a shaft afterwards sunk in the vicinity of this initial stake. A. There was.

Q. How close to it?

A. About 75 feet, I think, uphill.

Q. Who sank that shaft?

A. I sank it, and Mr. Cook, with the assistance of—

Q. Now, where did the trail run along there with reference to this initial stake and with reference to the shaft that was sunk there in 1905—where did the

(Testimony of J. C. Ridenour.)

trail run, how close to it?

A. The trail would be uphill about 300 feet, I should judge, from this shaft, and more—probably 400 feet and better feet from the stake.

Q. That is a trail that run there at the time?

A. During this summer of 1905.

Q. Of 1905. We desire now to introduce this notice of location, a certified copy of it.

Mr. McGINN.—(Reading said notice in evidence:)

[Defendants' Exhibit "B"—Notice of Placer Location by Henry Cook et al., Dated March 24, 1905.]

"8679.

NOTICE OF PLACER LOCATION.

NOTICE IS HEREBY GIVEN That we, Henry Cook, J. C. Ridenour, A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk and A. R. Armstrong, citizens of the United States, hereby claim 160 acres of mineral ground for placer mining purposes. Said ground being situate on the right limit of Dome Creek, and adjoining creek claims No. 1, 2, 3, 4 and 5, below discovery on said Creek. Said property being more particularly marked upon the ground as follows:

Commencing at this initial stake where a copy of this notice is posted, thence 660 feet in a Northwesterly direction to a stake placed firmly in the ground and marked Stake No. 1; thence 660 feet in a northwesterly direction to Stake No. 2; thence 660 feet in a northwesterly direction to Stake No. 3; thence 660 feet in a northerly direction to Stake No. 4; thence

660 feet in a northerly direction to Stake No. 5; thence 660 feet in a northerly direction to Stake No. 6; thence 660 feet in a northwesterly direction to Stake No. 7; thence 660 feet in a northwesterly direction to Stake No. 8; thence 330 feet in a northeasterly direction to Stake No. 9; thence 660 feet in a northeasterly direction to Stake No. 10; thence 660 feet in a southeasterly direction to Stake No. 11; thence 660 feet in a southeasterly direction to Stake No. 12; thence 660 feet in a southwesterly direction to Stake No. 13; thence 660 feet in a southerly direction to Stake No. 14; thence 660 feet in a southeasterly direction to Stake No. 15; thence 660 feet in a southeasterly direction to Stake No. 16; thence 660 feet in an easterly direction to Stake No. 17; thence 660 feet in a southeasterly direction to Stake No. 18; thence 660 feet in a southeasterly direction to Stake No. 19; thence 660 feet in a southeasterly direction to Stake No. 20; thence 660 feet in a southeasterly direction to Stake No. 21; thence 660 feet in a southeasterly direction to Stake No. 22; thence 660 feet in a southwesterly direction to Stake No. 23; thence 660 feet in a southwesterly direction to Stake No. 24; thence 660 feet in a northwesterly direction to Stake No. 25; thence 660 feet in a northwesterly direction to the initial stake, or place of beginning.

This claim shall be known as the Dome Group, and the initial stake is placed at the west side of said claim and near the side line of Creek Claim No. 1 below Discovery on Dome Creek; the property above described being located in the Fairbanks Recording District, District of Alaska.

The date of this location is March 24, A. D. 1905,

(Testimony of J. C. Ridenour.)

and it is the intention of the undersigned to hold and work the property above described in compliance of the laws of the United States, and the local rules, customs and regulations of miners.

HENRY COOK.
J. C. RIDENOUR.
A. T. ARMSTRONG.
W. H. SUMNER.
Y. L. NEWTON.
M. E. ARMSTRONG.
L. T. SELKIRK.
A. R. ARMSTRONG.

Filed for record April 17, 1905, at 35 min. past 11 A. M.

E. M. CARR,
Commissioner and ex-officio Recorder.
By Henry T. Ray,
Deputy."

And then the certificate of Arthur Frame, Commissioner, that this is a true and correct copy of the record. We ask that this be marked Defendants' Exhibit "B." (So marked by Clerk.)

By the COURT.—It may be admitted.

(Adjournment until 2 P. M.)

Mr. Ridenour, upon what date did you complete marking the boundaries of the Dome Group?

A. What date did I complete marking it?

Q. The Dome association, yes, sir?

A. The 24th of March.

Q. What year? A. 1905.

Q. Who assisted you, if anybody, in the staking of that claim?

(Testimony of J. C. Ridenour.)

A. No one gave me any assistance in staking the claim.

Q. Where was Mr. Cook at the time?

A. He was here in Fairbanks.

Q. Do you know why?

A. He had slipped on *cht* ice on Fox Creek and hurt himself in moving over, and he wasn't able to work.

Q. Well, after the staking of the boundaries there, what did you then proceed to do?

A. I proceeded to sink a shaft to bedrock.

Q. Where did you proceed to sink a shaft—on what part of the Dome Group?

A. Opposite the lower end of One, creek claim, about 150 feet from the west side line.

Q. And about how many feet from your initial stake?

A. It would be close to a hundred and fifty feet.

Q. State whether or not that hole that you sunk to bedrock there was within the boundaries of the Dome Group association. A. It was.

Q. Who assisted you, if anybody, in the sinking of that hole?

A. Peter Morris (on) helped me—I think helped me about a week.

Q. Morris, or Morrison?

A. Well, I guess it's Morrison; and then Henry Cook followed out.

Q. Then Henry Cook relieved him? A. Yes.

Q. When did you get to gravel in that shaft?

A. About sometime in the fore part of April.

(Testimony of J. C. Ridenour.)

Q. When did you first, if ever, make a discovery of gold in that shaft?

A. About the 15th of April.

Q. Did you pan yourself? A. I did.

Q. What material did you pan? A. Gravel.

Q. What did you find in the pan?

A. I found a little gold.

Q. How many pans did you pan at that time?

A. I don't recollect the number of pans—two or more.

Q. Well, after you discovered gold there about the 15th day of April, 1905, what did you then do?

A. Continued work until we reached bedrock.

Q. I'll ask you whether or not Henry Cook continued there on the claim all the time after the 15th of April? A. He did.

Q. Do you know whether he came to Fairbanks or not about that time?

A. Yes, he did come into town; I think he was gone about two days.

Q. Do you know when this notice of location was recorded?

A. I think about the seventeenth of April.

Q. 17th of April? Do you know who delivered it to the recorder here?

A. I suppose Cook did—I don't know.

Q. Do you know whether or not he was in town here at the time?

A. Yes, I prepared a notice and *sent in* with him.

Q. When did you prepare that notice?

A. Why, I think I prepared a copy at the same

(Testimony of J. C. Ridenour.)

time I staked.

Q. Then Cook returned out there did he?

A. Yes, he returned.

Q. And you continued sinking on that shaft until what time?

A. Close to the 20th of May, when we reached bedrock.

Q. You reached bedrock at that time; when you reached bedrock, what did you find?

A. We found ordinary creek wash and a little gold scattered through.

Q. Then, what did you do, Mr. Ridenour?

A. We came to town for supplies; I think we was away a matter of about a week, and then come back to the ground and done about five or six days more work in drifting in that hole.

Q. Now, when you were in town at that time, you may state whether you made any arrangements in regard to putting down any other shafts upon that property.

A. We did make arrangements for further work.

Q. State what those arrangements were.

A. We were to sink some more holes and do drifting during the winter, whatever work we was able to do during the winter—through that summer and winter.

Q. What were you to receive for that?

A. We were to receive an extra interest in the ground.

Q. Who do you mean by "we"?

A. Henry Cook and myself.

(Testimony of J. C. Ridenour.)

Q. How much were you to receive?

A. A. one-twelfth ~~each.~~

Q. Who did you make that agreement with?

A. Barnette.

Q. Who was he representing at that time?

A. He was representing the other locators in the ground, Sumner, Selkirk, Newton and the Armstrongs.

Q. About when was that agreement entered into with reference to the time you reached bedrock in that first hole? A. How?

Q. When was that agreement entered into with reference to the time you reached bedrock in that first hole?

A. Why after—afterwards, at the time we were in town here.

Q. About how many days after you reached bedrock, as near as you can tell?

A. O, between five and seven days; something of that kind.

Q. Then, when you returned what did you do, Mr. Ridenour?

A. We worked I think about five days in the first shaft on One, and then proceeded down to Four and proceeded to sink a shaft there.

Q. That is, upon what portion of the Dome Group?

A. The portion opposite No. 4 Creek claim.

Q. You know the property that is in controversy in this action, known as No. 3 first tier, right limit?

A. Yes, sir.

Q. Where was that shaft with reference to the

(Testimony of J. C. Ridenour.)

lower end line of that claim as claimed by the plaintiffs in this action?

A. About 20 feet from the lower line—close to that, between ten and twenty feet.

Q. When did you and Cook start in to sink that shaft?

A. I think it was the tenth day of June, 1905.

Q. And when did you reach bedrock in that shaft?

A. Between I think, between the 25th of July and the first of August—somewhere in that time.

Q. Of 1905? A. 1905, yes, sir.

Q. I'll ask you to state whether you found any gold in that shaft. A. We did.

Q. Of what value?

A. We had pans running from two to twenty cents to the pan.

Q. Well, after you reached bedrock in that shaft somewhere about the first of August, 1905, what did you do further in that shaft, if anything?

A. We didn't do anything further in that shaft until, I think, the latter part of October or the first of November; then we put in a drift of about fifty feet.

Q. About what time was it you started to drift?

A. Why, it was somewhere around the latter part of October or first of November—somewhere in there.

Q. And how much drifting did you do?

A. Fifty feet.

Q. Fifty feet—then, what did you do?

A. We sank a shaft on the portion of the Dome Group opposite Five below.

(Testimony of J. C. Ridenour.)

Q. When did you start to sink that shaft?

A. Some time in the month of December, 1905.

Q. When did you complete it?

A. We completed it, I think, in March—it and the drifting that went with it—just what time the shaft reached bedrock, I couldn't say.

Q. Did you do any drifting in that?

A. Yes, sir.

Q. What if anything did you find in that shaft?

A. We didn't find anything to speak of.

Q. Find any gold? A. We found fine gold, yes.

Q. The gold that was found in the second shaft that you sunk was paydirt?

A. We considered it paydirt at the time, and I believe the drift got out of it some.

Q. I'll ask you to state, Mr. Ridenour, whether from the location of this property on Dome Creek, and the colors you found in this first shaft on or about the 15th day of April, 1905, you felt justified, as an ordinarily prudent man, not necessarily a skilled miner, in doing further work and labor upon the property—on the Dome Group association claim, with the reasonable expectation of developing a paying property? A. We did.

Q. Did you ever receive any deed for this additional one-twelfth interest that you testified about?

A. Yes, sir.

Q. I'll ask you to refer to Plaintiffs' Exhibit No. 9, so marked in this transcript (in #1510 C. C. A. record) of Cook et al. vs. Klonos, and which was read in evidence to the jury yesterday, and state whether

(Testimony of J. C. Ridenour.)

that's the deed that you received for that work?

A. (After examining said paper.) Yes, sir.

Q. (After reading in evidence said Exhibit No. 9 at p. 324 of said printed record, and offered in evidence by plaintiffs herein at p. 588 of this transcript. Now, that name is signed there "A. T. Anderson,"—it should be A. T. Armstrong.

The COURT.—It may be considered corrected in the record.

Mr. McGINN.—And then, the acknowledgement before the notary public. I'll ask you to state whether or not that is the time you received the deed, the date it bears? A. Yes, sir, that's the time.

Q. Now, Mr. Ridenour, before you went out there to stake this property, was there any understanding as to what interest you and Mr. Cook were to have in the property? A. Before we went out to stake it?

Q. Yes, sir.

A. Yes, we had an understanding as to our proportion.

Q. What were you to receive?

A. A one-eighth interest each.

Q. Did you have any understanding or agreement with E. T. Barnette as to what, if any, interest he should receive in the property? A. No, sir.

Q. Did you know of any arrangement or agreement that E. T. Barnette had with these other six locators?

A. No, sir, I had no knowledge of it.

Q. Did you ever have any conversation with E. T. Barnette on the subject of what interest he was to re-

(Testimony of J. C. Ridenour.)

ceive in this property? A. No, sir.

Q. As a matter of fact, do you know up to the present time what arrangement he ever had with the people that you located for, other than what you have here heard in this testimony?

A. No, sir, I know nothing of his business with these people.

Q. When did you first speak to E. T. Barnette in reference to this matter—in reference to the staking of the Dome Group association?

A. That would be the 18th or 19th of March —

Q. Of 1905? A. 1905, yes, sir.

Q. Where did that conversation take place?

A. In the Fairbanks Banking Company's building.

Q. How was it that you and Mr. Cook went to Mr. Barnette at that time?

A. Well, Mr. Cook and myself needed grub to work with; we couldn't do any work anywhere else and we come to the conclusion that we might be able to get a grubstake as it were if we had anything that we could go to work on—if we knew any ground to work on—and so we made the proposition that—

Q. Did you know E. T. Barnette before that time?

A. No, sir, I did not.

Q. Do you know whether Cook knew him or not?

A. No, I don't know whether he knew him or not.

Q. And you went to him—and what conversation did you have—what was the understanding and agreement?

A. Well, I couldn't give you the conversation we had with him; most of the conversation was had be-

(Testimony of J. C. Ridenour.)

tween Cook and Mr. Barnette, but we made the proposition about the ground out there that we wanted to locate, and asked if he would go in, and we made the arrangement as to what I have said and that's practically all that I can tell about it.

Q. Did you ever have any further conversation with him on the matter prior to the time that you went out there and staked?

A. Personally I had none, only the one time.

Q. Now, at that time were you acquainted with McGinn & Sullivan?

A. No, sir, I had never saw McGinn and Sullivan on the streets even that I know of.

Q. Prior to the time that this property was located out there, prior to the time that you made your discovery, did you know of any understanding or any agreement whereby McGinn and Sullivan were to have any interest in the property?

A. No, sir, I knew nothing about any agreements of that nature.

Q. As far as you knew, who were to be the owners of the property?

A. Henry Cook, J. C. Ridenour, Sumner, Selkirk, Newton and the three Armstrongs.

Q. And what arrangements that may have been had with them, you say you knew nothing about?

A. I know nothing about it; no, sir.

Q. Do you know whether Henry Cook knew anything about it? A. No, sir.

Q. You say you don't know whether he did or not?

A. No, sir, I don't think he ever did.

(Testimony of J. C. Ridenour.)

Q. Did you know of any understanding or any agreement to the effect that Henry Cook was to have more than a one-eighth interest in the property prior to the time that this ground was staked there and a discovery made? A. No, sir.

Q. Where were you living about the 21st day of September, 1905? A. Goldstream.

Q. The 21st day of September, 1905?

A. Well, my home up to that time was on Goldstream.

Q. And do you remember this particular day, the 21st of September, 1905—the day that Rooney and these people—

A. O, September—I was thinking of March.

Q. Yes—the 21st of September, 1905?

A. Yes, sir, I was living on Three Below, Dome, in a tent.

Q. Where was your tent?

A. My tent was on the lower end of the ground that's in dispute, No. 3 Below, Dome.

Q. How long had you been living in that tent there Mr. Ridenour?

A. Since the tenth day of June, 1905.

Q. Who was living there with you?

A. Henry Cook.

Q. How long had he been living there?

A. The same time that I had.

Q. How far was that tent from the shaft that you sunk there?

A. Well, that would be between 50 and 75 feet, I should judge.

(Testimony of J. C. Ridenour.)

Q. In what direction?

A. Upstream, and a little uphill.

Q. Now, there has been some testimony here in regard to a road that ran along there: Will you just explain to the jury what that road was.

A. That road passed in front of the tent, and between the tent and the shaft and followed the dividing line between Three and Four from the center stake to the uphill stake, and a portion of the way from the center stake towards the creek stake, and then it turns and goes upstream.

Q. You mean the dividing line between Three and Four, first tier right limit below discovery?

A. Yes, sir—yes, sir.

Q. How far and in what direction was your tent—what direction from your tent was that road?

A. Upstream.

Q. About how many feet upstream?

A. Probably fifteen feet—it was right at the edge of the tent.

Q. How did your tent face at that time?

A. Faced downstream.

Q. What did you have there in that tent?

A. Had our camp outfit, our cooking utensils and so forth.

Q. What did you have out there on the property in addition to the tent and the camp outfit and the tools?

Mr. JENNINGS.—On what property?

Mr. McGINN.—The Dome Group?

A. We had a boiler.

Q. Where was this boiler? A. On Four.

(Testimony of J. C. Ridenour.)

Q. Well, how far from your tent would that be?

A. Well, that would be—wouldn't be over 60 feet—and probably only 50 feet.

Q. What kind of a boiler was it?

A. Tubular boiler, four horse-power.

Q. What else did you have there?

A. Pipe-line and pipe fittings, windlass, cable, bucket—everything necessary to do prospecting with.

Q. You also had—did you have a hoist there, or did you windlass the dirt? A. We had a windlass.

Q. Now, on the 21st day of September, 1905, you may state whether you saw William Rooney, Gus Plaschlart and Johnson on this property in controversy? A. I did.

Q. I wish you would go on now and state to the jury the circumstances under which you saw them, and the conversation you had at the time, and all about it.

A. The first that I saw of them they were at the uphill lower end corner stake of the claim—

Q. That would be the northwest corner would it—northeast corner? A. Northeast corner.

Q. That is, of this Three claim?

A. Of Three, yes, sir.

Q. First tier?

A. Yes, sir; and I noticed them working there—

Q. What were they doing?

A. They appeared to be staking; and they come by the tent in a few minutes afterwards—and I don't know who spoke first, either they or me passed the time of day; I was in the tent. I asked them what they were doing; they said they were staking Three.

(Testimony of J. C. Ridenour.)

* * * A. I'm not positive which one spoke, but Rooney done most of the talking. So I rather think it was him that answered. And I told them that they had better not locate the claim, as it was a part of the Dome Group. Well, I think it was Rooney spoke up and wanted to know who the Dome Group was, or where it was? And I told him that—who claimed it—

Q. What did you tell him?

A. I told him that Cook and myself and six other parties,—and I named over, I think, four of them and two of them I couldn't quite call the names of —and I told them they could find the location notice up at One, and that all of the names would be on it. And then—so one of the crowd asked me if we had ever done any work on it, and I says, "Yes, we had a shaft on One and pointed to the shaft there on Four just a few feet from the tent"—like that (indicating) it would be standing to my right. Gus Plaschlart, I think, spoke up and made the remark there would have to be work done on each and every twenty acres—something like that—I didn't pay much attention to what he did say. And they started off with something, I don't quite remember the remark—I says, "You better not stake because it will do you no good, as we own the claim—this ground, and have complied with the law." And that's practically all that was said, and then they passed on.

Q. Did you use the name Rockefeller at that time?

A. I did not.

(Testimony of J. C. Ridenour.)

Q. Did you tell them at that time to go ahead and stake it? A. I did not.

Q. I'll ask you to state whether everything was peaceful and harmonious there, or whether there was any words used that were hot and angry?

A. Well, apparently everything was peaceful; I might have showed a little signs of anger because I wasn't feeling any too good to see parties come along there and make trouble, and I probably showed it a little in the tone of voice I used.

Q. Did—what, if anything, did they carry with them?

A. One of the parties had an axe—I'm not sure whether they had two axes or not, I remember distonctly of one axe.

Q. That was the substance, practically all of the conversation?

A. That's as near as I can recollect it.

Q. Then where did they go?

A. They passed by in front of the tent and went to the center stake of the claim and set a stake there and passed on, and I saw them no more.

Q. Did they do any blazing along there?

A. I think they chopped off two or three trees between the center stake and the uphill stake—trees that the wagon road run close to and it dug the ground away from around the roots and they were in the way, and they cut them off and throwed them out of the way.

Q. I'll ask you to state whether the line from the northeast corner stake to the lower center stake was

(Testimony of J. C. Ridenour.)

well cut at that time. A. It was.

Q. From the center stake down to the corner stake near the creek?

A. It had been well marked out too.

Q. How about the side line, that is, the east side line of No. 3; were there any blazed lines along there?

A. Yes, there was old blazed lines along there, or was at the time—Friend and Lawson's line was swamped out. I said Friend and Lawson—I mean Pounder and Graham's line, it is Friend and Lawson's at the present time—so you could see from stake to stake.

Q. Now, where was that line with reference to the line—that is the east side line, as claimed by the plaintiffs in this case—the uphill line?

A. That is as claimed by the plaintiffs?

Q. Yes, the plaintiffs here—Rooney and—

Mr. PRATT.—Of No. 3 Bench in controversy?

A. Well, that, I think, is inside of the lines I claim—I don't understand exactly what they claim.

Mr. McGINN.—Did you ever see Rooney's stakes out there? A. Yes.

A. Well, where was his stake with reference to the northeast corner stake of the Pounder and Graham location?

A. It was, I think, tied to their stake.

Q. Tied to their stake?

A. Right there by it any way.

Q. Do you know where the Southeast corner stake of Rooney is?

(Testimony of J. C. Ridenour.)

A. The southeast—it's right in a bunch of stakes, close to the original stake there that Hastings had.

Q. Did you ever see that stake of Hastings?

A. Yes, I saw that stake; I don't know just what time I did see it.

Q. Do you remember about when?

A. Sometime along in the summer that summer, and I have seen it off and on different times since.

Q. The summer of—

A. There's a big bunch of stakes there.

Q. The summer of 1905? A. Yes, sir.

Mr. JENNINGS.—He said last summer.

A. No, that summer.

Mr. McGINN.—What kind of a stake was that Mr. Ridenour? A. Hastings'?

Q. Yes, sir? A. A small tree cut off, I believe.

Q. Do you know whether or not that stake is still standing?

A. I think it is—I wouldn't say as to that.

Q. Did you ever see the initial stake of Hastings—the upper center stake?

A. Yes, I have saw it, but I couldn't recall just what it is like now.

Q. When did you see it?

A. I guess some time in the summer time of 1905. I think I noticed that first in August; I wouldn't say as to what time.

Q. Now, in regard to the northeast corner stake, did you ever see a stake there of Hastings?

A. Yes, sir, I saw that.

Mr. McGINN.—When did you see that stake?

(Testimony of J. C. Ridenour.)

Mr. PRATT.—Which one are you talking about now?

Mr. McGINN.—The northeast corner, downstream uphill corner, that is, between the first and second tier, downstream?

A. I couldn't tell exactly what the first date was, but it was shortly after we moved down there to work.

Q. How close to that stake were you working there? A. About a hundred feet.

Q. What kind of a stake was that Mr. Ridenour?

A. As I remember it was a small tree knifed down, cut off at the top and just squared up.

Q. Did you see any writings on it?

A. There was writings on it, I never paid any particular attention—just enough to know it was a corner of Three.

Q. Do you know what became of that stake?

A. Yes; there was some horses hitched to it once, and they tore it down.

Q. When was that?

A. That was during the summer of 1905—it was used for a hitching-post.

Q. Was there a line, a blazed line between that stake and the southeast corner stake in 1905 in the summer? A. Yes, sir.

Q. Now, with reference to that line where did the side line of the Dome Group run, in that immediate vicinity?

A. It was right at the corner—right along the cor-

(Testimony of J. C. Ridenour.)

ner, and as it went upstream it got inside of the lines of Three.

Q. How far upstream did it go within the lines of Three, first tier?

A. O, I couldn't say exactly; but I think it would be in the neighborhood of eight hundred feet.

Q. And then in what direction did it go?

A. It would go east then, across uphill.

Q. Now, upon the 21st day of September, 1905 what kind of a line was that, Mr. Ridenour?

A. Which? The—

Q. The Dome Group line there?

A. It was a well-blazed out and swamped out line the 21st day of September. You could—you could see—you could stand at Stake No. 16 I believe that is the corner there, and you could see the other stakes in either direction from that stake.

Q. Do you know when the second tier of claims were staked?

A. No, not exactly; there was some of them staked in the summer of 1905—I think in the latter part of April.

Q. Who staked that claim?

A. I'm not sure whether Gianakus staked it, or a man by the name of—I can't call his name now.

Q. Well, it was staked anyway? A. Yes.

Q. How was the line—how far down did the Gianakus location as we will call it, extend down—that is, with reference—how far down did it go upon Three, I don't mean any overlap, but along—

A. It joined.

(Testimony of J. C. Ridenour.)

Q. It adjoined? A. Yes, sir.

Q. Three, first tier? A. Yes, sir.

Q. For what distance? A. About 660 feet.

Q. About 660 feet? What—how did that claim run? A. Thirteen hundred and twenty feet uphill.

Q. And how wide?

A. Excuse me, did I say Three was located then?

Q. In April, 1905?

A. Well, there was some one of those claims in the second tier, I wouldn't say whether it was the lower end of Two, or the upper end of Three, but there was a location notice put in there as a Three location notice, or a location rather that adjoins Three first tier—second tier claim.

Q. Now, I'll ask you to state whether or not the lines between those two claims in the summer of 1905, was blazed out?

A. Yes, the line—the second tier line of Three was blazed, and also the line between—the uphill line of Three, first tier, was blazed; but I think there was an overlap—second-tier Three overlaps into Three first tier—but the lines were blazed out.

Q. Both lines were blazed. Now Mr. Ridenour, when was this overlap made, if you know?

A. The Threes?

Q. Yes.

A. Now, I don't know, I suppose it was a location—

Q. Well, was it before that time, before the summer of 1905? A. Yes.

Q. Now, Mr. Ridenour, I'll ask you whether or not

(Testimony of J. C. Ridenour.)

you have ever selected twenty acres of the, or any portion of the Dome Group association for your individual use? A. I have.

Q. When did you do that, Mr. Ridenour?

A. I think the 9th day of April a year ago, 1909.

Q. What part of the Dome Group association did you select?

A. The portion known as Three Below, first tier, right limit.

Q. Who was with you at the time you made that selection?

A. Jackson the surveyor, and Henry Cook—I don't know, I think there was someone else present.

Mr. PRATT.—What was that date?

A. The 9th of April.

The COURT.—The 9th of April, 1909?

A. Yes, sir.

Mr. McGINN.—What did you do in the way of making a selection out there, Mr. Ridenour?

A. Well, we set out stakes, and I posted a notice—I personally didn't— Personally I did not attend to the staking, as I was not well that day. I was out on the ground.

Q. What stakes did you put up at that time?

A. What stakes did I personally put up?

Q. Well—were put up under this location or selection that you made?

A. There would be two lower end stakes on Three, and upper—two upper end stakes on Three.

Witness Ridenour then testified that the claim selected by him was within the exterior boundaries of

(Testimony of J. C. Ridenour.)

the Dome Group Association claim; that the boundaries of the said selection were plainly marked upon the ground so as to be readily traced; that notices were posted claiming the ground as J. C. Ridenour's.

Q. What work was done on the Dome Group in 1906?

A. There was a shaft sunk and about 35 feet of tunnel work drove. The shaft was sank from a depth of 35 or 40 feet to a depth of 144 or 145 feet—something over 100 feet of shaft in depth, and 35 feet of tunnel work done in 1906.

Q. What was the value of that work approximately in round numbers—I don't care anything particularly about accuracy?

A. Oh, a thousand dollars or more.

Q. What work was done in 1907 within the limits of the Dome Group?

A. There was two shafts put down—

Q. Now, just a minute: Who put down that shaft in 1906? A. Mr. Cook and myself.

Q. And upon what portion of the Dome Group was that?

A. The portion known as Five, first tier, right limit.

Q. That's the third hole you spoke of before in your testimony? A. Yes, sir.

Q. Now, in 1907 you say there was—

A. There was a shaft put down at the lower end of One, first tier, and a shaft put down close to the line of Two and Three.

(Testimony of J. C. Ridenour.)

Q. What was the value of that work?

A. Let's see—the cost would be close to twenty-five hundred dollars.

Q. In 1908 state what work, if any, was done upon and within the boundaries of the Dome Group—first, who sunk those shafts in 1907 Mr. Ridenour?

A. Homer Clemmons, and Micky McGavick sank the one on One on contract; the one on No. 1 Below first tier, right limit; and Cook was there in person for the one on the lower end of No. 2 and he had others working with him which he paid.

Q. Who paid for that work?

A. I paid a portion of it, Cook a portion; I don't know who paid the balance.

Q. This work was done for the benefit of the Group was it?

A. It was; and I will state further there was quite a tunnel drove on the lower end of One that summer; I suppose that would be close to the value of a thousand dollars.

Q. That was in 1907? A. 1907.

Q. Now in 1908 what was done within the lines of the Dome Group?

A. There was extensive mining that summer, mining on—

Q. Well, there was over a hundred dollars worth of work done?

A. Yes, and over a hundred thousand.

Now, I'll ask you, Mr. Ridenour, if from the stakes that were placed by you or caused to be placed by you on the property which you have de-

(Testimony of J. C. Ridenour.)

scribed, and which embraces a greater portion of Claim No. 3 below discovery, first tier, right limit, that the boundaries thereof could be traced by anyone seeking in good faith to determine what you were selecting at the time?

A. Yes, the lines seemed to be marked so you could pass from stake to stake; they were when I went over it any way.

Q. Mr. Ridenour, what was the value of the work and labor done and performed by you and Mr. Cook upon the Dome Group prior to the 21st day of September, 1905, when the plaintiffs in this case entered upon and staked this No. 3 in dispute?

A. The value of the work done there, estimated at cost at that time, would be over three thousand dollars worth of work.

Further Redirect Examination.

Q. Now, in your testimony that they read to you here, you stated that you lived on Four in June, 1905? A. Yes, sir.

Q. I'll ask you to state what you meant by that?

A. It was the common talk of the country—

Q. Well, just what you meant by that it all I want.

A. That's what I was trying to get at. Anybody that lived right in there was supposed to be on Four; Pounder & Graham was supposed to be on Four, while in reality they were at the line, and we called it Four because he was right there by them, and anybody that wanted to know where he was we would say, "Go to No. 4 and you will find us." We would be working on Four, and part of the time we were

(Testimony of J. C. Ridenour.)

living on Four, but, as it happened, the tent was on No. 3.

Q. How long did your tent remain there on Three?

A. Well, I think in—probably February, 1906.

Q. Then, what did you do? A. Tore it down.

[Testimony of Richard Stafford, for Defendants.]

RICHARD STAFFORD, witness called on behalf of the defendants, and thereto first duly sworn, testified as follows, on

Direct Examination.

(By Mr. McGINN.)

Q. What is your name? A. Richard Stafford.

Q. Where do you reside, Mr. Stafford?

A. Fairbanks.

Q. How long have you resided in the Fairbanks Recording District of Alaska?

A. Since the spring of 1904.

Q. Prior to that time, where did you reside?

A. I was in Dawson for several years.

Q. What business have you been following since you were in Dawson and since you were here?

A. Mining.

Q. Placer mining? A. Yes, sir.

Q. State whether or not you have done any prospecting.

A. I have been prospecting most of the time down here, also some in the Upper Country.

Q. I'll ask you to state whether you staked or recorded and located any mining claims in the Fairbanks Recording District? A. I have, yes, sir.

Q. Are you acquainted with Dome Creek?

(Testimony of Richard Stafford.)

A. Well, somewhat.

Q. When were you first upon Dome Creek?

A. I was first on Dome Creek in the summer of 1904.

Q. What part of the summer of 1904?

A. About July, I think.

Q. How long were you there then?

A. I was there a day.

Q. What part of the creek were you on?

A. I came down on the creek, down about the lower end of the creek, and followed up the creek until possibly Two or Three above.

Q. What were you doing there, Mr. Stafford?

A. I done some prospecting there.

Q. How did you prospect?

A. Some panning.

Q. Where did you pan?

A. I panned in some holes that had already been sunk on the creek.

Q. Where were those holes? A. Creek claims.

Q. Where were those holes?

A. Those holes were on the creek claims, there was—

Q. What creek claims?

A. Well, I couldn't say exactly what claims, but around discovery and below discovery, and I think probably Two or Three above discovery.

Q. Are you acquainted with the property that is generally known as No. 3 below discovery, first tier, right limit of Dome Creek?

A. Yes, I know considerable about it.

(Testimony of Richard Stafford.)

Q. When were you first upon that property?

A. I was on that ground in July, 1904.

Q. What, if anything, did you do upon this Claim No. 3 in July when you were out there in 1904?

A. In July I merely looked at the location of the claim and saw it was situated—

Q. What did you do in the way of looking at the location of the claim at that time?

A. I came up to the lower end of the claim, and I saw the lower center stake and I went along the creek line—

Q. Well, now, before you go there what kind of a stake did you see there, Mr. Stafford?

A. O, a stake about four feet high cut off and squared.

Q. Was it a stake or a tree?

A. It was a tree cut off.

Q. The roots were still in the ground?

A. Yes, it was fast there as far as I recollect.

Q. It wasn't a stake that was driven in, as far as you know? A. No, I know it wasn't now.

Q. And state whether or not the sides of that tree was blazed. A. The sides were squared.

Q. What did you see on that stake, Mr. Stafford?

A. The lower end center stake, No. 3, first tier; that's all that I remember.

Q. Was there anything else written upon it?

A. Not that I remember of; I don't know whether Hastings' name was written upon it or not.

Q. Do you remember whether it had any date on it? A. No, sir, I do not remember.

(Testimony of Richard Stafford.)

Q. Do you know whether or not it claimed any feet in any direction from it?

A. I don't remember that.

Q. Now, from that stake, where did you go?

A. I went to the line between the creek claim and the Three, first tier.

Q. Three creek claim and Three first tier?

A. Yes, sir.

Q. Went right to the line? A. Yes, sir.

Q. What—how did you go down there?

A. Well, there was a blaze from the center down to the corner stake, and I followed the blazed line.

Q. What did you see when you got down there at the end of the blazed line?

A. There was the corner stakes of—there was three or four corner stakes there, the creek claims and of Three, first tier.

Q. What if anything—what kind of a stake was this Three first tier stake?

A. Well, Three first tier was a stake about four foot high and squared—it was a tree cut off.

Q. What, if anything, was written upon it that you now recall?

A. There was corner stake of Three, first tier; I think that was all that was on it, corner stake—

Q. Now, what kind of a line was this that was blazed out between that stake and the lower center stake you have already described?

A. Well, it was a blazed line through there; there was some brush there and it was blazed.

Q. State whether or not you had any difficulty in

(Testimony of Richard Stafford.)

following it. A. I had no trouble in following it.

Q. State whether or not it was a well-defined line.

A. It was defined so you could follow it.

Q. Now, what stake would that be with reference to the directions of the compass—saying that Dome Creek flows north, and the creek claims being to the west of the bench claims?

A. That would be the northwest corner stake.

Q. The northwest corner stake? A. Yes, sir.

Q. After seeing that stake Mr. Stafford, what did you do?

A. I went up the creek, along between Three creek claim and Three first tier.

Q. How did you happen to go up there?

A. It was blazed along there, and there was sort of a trail along there.

Q. State whether or not the trail was along the blazed line.

A. There was kind of a trail along the line between the two claims.

Q. How far did that line extend upstream?

A. Well, I went up to Two on that line.

Mr. PRATT.—This is in July, 1905?

A. July, 1904.

Mr. McGINN.—You mean up as far as Two, No. 2 below, creek claim? A. Yes, sir.

Q. What, if anything, did you see there?

A. Why, I saw a corner of creek claims, and the corner of the first tier of benches.

Q. What corner of the first tier of benches did you see, if any?

(Testimony of Richard Stafford.)

A. I wouldn't be positive what corners was marked there.

Q. Well, I mean of what claims—what bench claims?

A. Well, of Three first tier, and Three creek claim.

Q. Did you see any stakes there of any other claims?

A. There was three or four stakes there, I'm not sure how many.

Q. Did you see any stakes there of Two, first tier, Two Below?

A. I wouldn't be positive about Two.

Q. Now, what writing did you see upon that stake —that led you I believe it is the stake of No. 1, first tier—No. 3, first tier.

A. There was "Corner Stake of Three, first tier," written on it.

Q. Was there anything else written on it that you recall? A. No, sir, not—

Q. From there where did you go Mr. Hastings—or Mr. Stafford?

A. I went up creek, followed up the creek to about No. 3 above.

Q. And then went where?

A. I came over to Pedro Creek from there.

Q. I'll ask you whether or not upon that occasion you saw any other of the stakes of No. 3 Below, first tier, right limit of Dome Creek?

A. I think not.

Q. When were you next there, Mr. Stafford?

(Testimony of Richard Stafford.)

A. I went over in September some time, in September next.

Q. Do you remember what time in September?

A. It was the latter part of September.

Q. Of 1904? A. Yes, sir.

Q. Do you know who claimed to be the owner of that property at that time?

A. Why, I understood Mr. Hastings—Mr. Woodward, Mr. Hastings and Mr. Roth owned the claim in common.

Q. What Hastings was that?

A. U. G. Hastings.

Q. What Roth was that?

A. It was R. F. Roth.

Q. R. F. Roth is the attorney?

A. He was a broker here at the time.

Q. And Mr. Woodward, what was his name?

A. William Woodward.

Q. I'll ask you to state whether you had any dealings or negotiations with them in 1904 with regard to this piece of property.

Q. Do you remember the date?

A. About the first of September, as near as I recollect, 1904.

Q. I'll ask you to state whether or not any writings or written agreement were entered into between you and these people you have named at that time.

A. Yes, sir, we had a bill of sale of the ground.

Q. Was that in September, 1904, that you got that bill of sale? A. Yes, sir.

Q. Have you got the agreement?

(Testimony of Richard Stafford.)

A. I haven't the agreement, no.

Q. Do you know where it is?

A. No, I do not; the last I knew of it de Journel had it here.

Q. Your deposition was taken at one time was it not Mr. Stafford, in the case of Klonos et al. vs. Stafford? A. Yes, sir.

Q. I'll ask you to state whether or not you were called upon at that time to produce this written agreement.

A. Yes, I produced the agreement at that time.

Q. Do you know whether or not it was read into the deposition at that time—or not?

A. I think it was.

Q. Well, after this agreement was *entere* into, state whether or not you went out to Dome Creek again?

A. I went out to Dome Creek shortly after.

Q. In what month?

A. It would be in September, 1904.

Q. I'll ask you to state whether or not you went upon the property known as No. 3 below discovery, first tier, right limit. A. I did.

Q. Do you remember what part of September that was?

A. Well, it would be well on in September, that's as near as I can recollect.

Q. That was in 1904? A. Yes, sir.

Q. Just tell the jury what you did there on that occasion, Mr. Stafford?

A. I went down on Three—

Plaintiffs object—

(Testimony of Richard Stafford.)

Mr. PRATT.—I presume, of course, now, what this is leading up *ot* he is going on to try to show a discovery of gold.

The COURT.—Objection overruled. State your objection, whatever it is, and let's get along.

Mr. PRATT.—Our objection is this: if the Court please—that to fix a mining title it takes a marking of the boundaries, and a discovery of gold by the locator, or by some one on his behalf. Now, this witness, so far as I can tell by indications, would say that U. G. Hastings located that ground. It isn't even shown yet that the boundaries were marked, all of them; there is no testimony of any kind even squinting at the proposition that Mr. Hastings or anyone on his behalf made a discovery of gold. Now, it certainly can't be that this man, by purchasing it, could by any possibility perfect that location.

The COURT.—Yes, I think he can. I think Christman vs. Miller settles that—objection overruled. We haven't got to that yet anyway.

Plaintiffs except.

Mr. McGINN.—I'll ask you if this is a part of the deposition the agreement was read into at that time?

Mr. PRATT.—O, if you say that is the agreement we don't question it. I would like to say to the Court at this time we would ask the Court to withhold any opinion, or decided opinion, upon that question until we can be heard. It is true Christman vs. Miller did take a position on it which is very extraordinary, and we have authorities and we have looked into that matter carefully.

(Testimony of Richard Stafford.)

The COURT.—Well, I will hear you on that later, but this part of the testimony may proceed.

Mr. McGINN.—(Producing paper attached to deposition.) Is that a copy of the agreement, Mr. Stafford?

A. Yes, sir, that's a copy.

Mr. McGINN.—I would like to read that agreement into the evidence, if the Court please.

Mr. JENNINGS.—I would like to have it understood that we object to any testimony to prove any Hastings or Stafford location until they prove a discovery by Hastings or a discovery and marking by Stafford.

Objection overruled. Exception.

Mr. McGINN.—(Reading agreement in evidence:)

[Defendants' Exhibit "N"—Agreement, Dated September 2, 1904, Hastings—Stafford.]

"AGREEMENT.

THIS AGREEMENT made the second day of September nineteen hundred and four between U. G. Hastings of Fairbanks, Alaska, and Richard H. Stafford, of the same place, WITNESSETH:

That said Hastings, herein called the party of the first part, for and in consideration of the sum of Three Hundred Dollars, lawful money of the United States of America, fifty dollars of which has been paid to the said party of the first part by said Stafford, herein called the party of the second part, and the receipt of which is hereby acknowledged, covenants and agrees to and with the party of the sec-

ond part to execute to the said party of the second part a good quitclaim deed to that certain lot, piece or parcel of land described as side-claim number three (3) below Discovery on the right limit on Dome Creek, when said party of the second part shall pay to said party of the first part two hundred and fifty (250.00) Dollars lawful money of the United States, the sum remaining unpaid on said purchase price of three hundred dollars, and the said party of the second part for and in consideration of the premises, covenants and agrees to and with the said party of the first part to pay to the said party of the first part the sum of two hundred and fifty (250) Dollars on September the second nineteen hundred and five. And it is understood and provided that if said party of the second part fails to pay said $250.00 on said September the second nineteen hundred and five, then the said sum of 50 dollars already paid shall be forfeited to the party of the first part, and said party of the first part may consider this agreement abrigated and at an end.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written.

U. G. HASTINGS, [Seal]
By GEORGE ROTH, [Seal]
His Attorney in Fact.
RICHARD H. STAFFORD. [Seal]

Signed and sealed in the presence of:
ROY V. NYE.
W. F. WOODWARD.

United States of America,
Territory of Alaska,
Fairbanks Precinct,—ss.

THIS IS TO CERTIFY that on this 25th day of January, 1907, before me, the undersigned, a Notary Public, personally appeared W. F. Woodward, known to me to be the same person whose name is subscribed to the within instrument as a witness thereto, and with whom I am personally acquainted, and said W. F. Woodward being first duly sworn, deposes and says:

That his place of residence is Fairbanks, Alaska;

That he knows U. G. Hastings; that he knows U. G. Hastings and George Roth;

That U. G. Hastings is the person described in the within instrument, and George Roth was at the time of the execution thereof the attorney in fact of the said U. G. Hastings by force and virtue of the power of attorney executed by the said U. G. Hastings and a*po*inting the said George Roth on the 10th day of September, 1903, and acknowledged on the 11th day of September, 1903;

That said George Roth did, in my presence execute the within conveyance to R. H. Stafford for U. G. Hastings and sign his name as his attorney in fact on the 21st day of September, 1904, and I saw the said George Roth sign the name of U. G. Hastings and the name of George Roth as his attorney in fact, seal and deliver the same as such attorney and George Roth duly acknowledged in the presence of affiant that he executed the same as such attorney

(Testimony of Richard Stafford.)

and for the purposes therein mentioned, and that he the said affiant thereupon and at the request of said George Roth subscribed his name thereto as a witness.

IN WITNESS WHEREOF I have hereunto set and affixed my Notarial Seal the day and year first in this certificate written.

[Seal] HENRY RODEN."

(The foregoing document was received in evidence May 21, 1910, and marked Defendants' Exhibit "N.")

Q. The George Roth, purporting here to act as the attorney in fact of U. G. Hastings, is the person whom I believe you stated you understood had an interest in the ground? A. Yes, sir.

Q. And the W. H. Woodward who witnessed this agreement, is the William Woodward that you have testified about here? A. Yes, sir.

Q. About heretofore. Now, before you went out there upon—in the month of September, or the middle or latter part of it, 1904, did you have any conversation with Mr. Woodward or Mr. Hastings or Mr. Roth in regard to this property?

A. Yes, we talked about the claim a good deal, and—

Mr. JENNINGS.—Don't say what was said now—you have answered the question.

Mr. McGINN.—Now, I will ask you to state what it was.

Objected to as hearsay.

The COURT.—On what theory do you insist on

(Testimony of Richard Stafford.)

that testimony, Mr. McGinn?

Mr. McGINN.—Simply going to show that they told him to go out there and make a discovery.

The COURT.—Well, I think it is hearsay.

Mr. McGINN.—Suppose he gets express authority to go out there and do that. They are the owners of the property, and the title didn't pass until a year later.

The COURT.—Very well, he may answer—objection overruled.

Plaintiffs except.

Mr. McGINN.—What was the conversation in regard to that matter—in regard to a discovery, if anything?

A. We talked about the claim, and I asked in regards to discovery and Woodward told me that I better go out, and there was a gulch on the lower end of the claim, and make a discovery myself, as he didn't understand really what a discovery was. There was some question at that time about it—he said go and satisfy yourself.

Q. I'll ask you to state whether or not that was the reason you went out there in September.

—or for what reason you went out there in September, 1904?

A. I went to see the stakes of the claim and see that the boundaries was all right, and I wanted to see if I could make a discovery myself.

Q. Now, just tell the jury what you did there in September, 1904, and what you saw?

A. I went down on Two, until I came to the upper

(Testimony of Richard Stafford.)

center stake of No. 3, first tier.

Q. What kind of a stake was that, Mr. Stafford?

A. That was a tree squared four sides—

Q. How high?

A. I don't know if that was cut off or not, I wouldn't be positive about that how high it was. It may have been a tall—I believe it was a tall tree, possibly 10 feet high, 8 or 10 feet high.

Q. How about the sides of it, what were the appearances of it?

A. It was about four or five inches square.

Q. It had been squared?

A. It had been squared there where it was written on.

Q. You know where the lower end of Two was, first tier below discovery?

A. Yes, sir; I know what they claim is the lower center of Two.

Q. Do you know who claimed that property in September, 1904?

A. No, sir; I don't know who claimed Two in September, 1904.

Q. What writing, if any, did you see upon this stake?

A. On the side that was squared off next to Three, there was a location notice written there and signed by U. G. Hastings.

Q. Just tell the jury as near as you can remember, what was written upon the stakes.

A. The stake—it was: "I claim 1320 feet down alongside of Creek Claim No. 3 by 660 feet wide, for

(Testimony of Richard Stafford.)

mining purposes," signed by U. G. Hastings.

Q. Was there any date on it?

A. The date was on it; the date, I think, that was January second, 1904.

Q. Were there any other names on it that you recall?

A. I don't think so. I looked for Hastings' name, and I saw the Hastings stake there.

Q. Mr. Stafford, did you ever see the notice of location that had been recorded of that claim, either prior or subsequent to the time you went there in September, 1904?

A. I have seen it some time later on, I think.

Mr. McGINN.—Did you see the posted notice, or the recorded notice?

A. Well, the recorded notice is the one I saw.

Q. How did the writing upon that stake compare with the writing on the location notice that was recorded as you remember it?

A. Well, as I remember, they were the same.

Mr. McGINN.—Did you see any other writing on that stake?

A. There was writing on the upstream side of the stake, I don't remember what it was.

Q. Do you know whether there was any name on it? A. I couldn't say what was on it at that time.

Q. Then, after seeing that upper center stake, where did you go?

A. I went over to the right hand corner stake of the claim, the uphill corner stake, upstream corner stake.

(Testimony of Richard Stafford.)

Q. That would be the southeast corner would it, to you? A. That would be the southeast corner.

Q. It would be between the first and second tier?

A. Yes, sir.

Q. And the upstream end of the claim?

A. Yes, sir.

Q. How did you happen to go over there?

A. I went to see all the stakes on the claim.

Q. Well, was there anything that lead over that way?

A. I followed the lines was blazed across to the stake.

Q. Just tell the jury how the lines were blazed, whether they were blazed so you could readily follow them or not?

A. The line was blazed across there pretty well cut out to that corner.

Q. What was the distance between this upper center stake and this southeast corner stake as near as you can tell?

A. I think it was about three hundred feet.

Q. What kind of a stake did you see there?

A. That was a tree cut off, squared.

Q. How high did it stand from the ground?

A. About four feet high.

Q. What dimensions was it squared?

A. It would be four or five inches square, anyway.

Q. Good substantial stake, was it?

A. It was a tree cut off.

Q. What if any writing did you see upon that stake?

(Testimony of Richard Stafford.)

A. There was marked on it "The Corner Stake of No. 3, first tier."

Q. Anything else that you remember?

A. Not that I remember of.

Q. From that stake where did you go?

A. I followed down to the lower corner stake, right—and uphill corner stake, of No. 3.

Q. That would be the northeast corner stake, would it?

A. Yes, that would be the northeast, I presume.

Q. That would be the lower, uphill corner stake?

A. It would be the lower, downhill corner stake.

Q. How did you happen to go down that way—*or lead* you down?

A. I followed down, the line was blazed from there down there—I followed along the blazed line.

Q. State whether or not it was a blazed line that you could readily follow.

A. I had no trouble in following it.

Q. What kind of a stake did you see there?

A. There was a stake there, it was a tree also that was cut off and squared, a stake I think about two or three inches square possibly 3 inches square—it wasn't a very large tree.

Q. How high from the ground was that stake?

A. Well, it was four or five feet anyway, from the ground.

Q. What was written upon it if anything that you can now recall?

A. There was "Corner stake of No. 3 first tier."

(Testimony of Richard Stafford.)

There was also marked with an arrow, sort of an arrow pointing—

Q. Pointing in what direction?

A. Pointing towards the center stake.

Q. That would be towards the creek?

A. Yes, sir.

Q. From there where did you go?

A. I went over to the lower center end strike.

Q. What kind of a line was that—or was there any line along there between this northeast corner stake and the lower center stake?

A. There was a blazed line over there to the center stake.

Q. State whether or not you had any difficulty in following that line.

A. I had no difficulty whatever in following it.

Q. Yes, then you went to the lower center stake which you had already seen in July of that year?

A. I went all around the stakes at that time; that is, I went to the lower center stake—

Q. Well, now, what did you see written on the lower center stake at that time?

A. Oh—"Corner stake of No. 3"—

Q. On the lower center stake?

A. On the lower center stake there was written "Lower center stake of No. 3, first tier," and I think Hastings' name was signed under it.

Q. Are you positive about that?

A. I'm not positive about that.

Q. And then from there you went to what stake?

A. I went to the downhill, downstream corner.

(Testimony of Richard Stafford.)

Q. I'll ask you what you followed in going down there? A. I followed the blazes down there.

Q. Is that the same blazed line you follow in July when you were there?

A. It is the same direction, same decline I think.

Q. And then you went down to the northwest corner? A. Yes, sir.

Q. And you have already described that stake?

A. Yes, sir, that was a tree cut off, about four feet high.

Q. And that was the same stake you saw there in July? A. Same stake.

Q. Then, where did you go?

A. I went back to the center stake I think from there, lower center stake.

Q. Well, did you go on that occasion, to the southwest corner stake?

A. I went up that line coming back up the creek; I came up that line between the creek claim and the first tier of benches.

Q. From the—from what stake?

A. From the lower corner stake, downhill corner stake.

Q. Lower corner stake—what did you follow in going up there?

A. Oh, there was just a blazed line along there.

Q. And did you see any stake of No. 3 at the upper end? A. The upper corner stake, I saw that.

Q. That would be the southwest corner stake?

A. Yes, sir.

Q. I'll ask you to state whether or not that's the

(Testimony of Richard Stafford.)

same stake you saw there before in July.

A. It would be the same stake, I think.

Q. What did you see written on it then?

A. It was, there was marked—as near as I can recollect: "Corner stake of No. 3, first tier," and there was arrows pointing uphill to the center stake, and I believe there was 330 feet marked on it, I wouldn't be certain about that.

Q. Can you state whether or not there was arrows on all of the stakes?

A. I think there were. It was on some of them anyway, I wouldn't be sure whether it was on all of them or not.

Q. Now, I'll ask you if, from the stakes you saw there, the writings that you saw, the blazed lines that you saw there, upon that occasion, whether a prospector searching in good faith to determine the boundaries of that claim, could readily have determined what the boundaries of it were by tracing the boundaries on the ground?

A. I had no trouble; I think they could be easily traced.

Q. Well, after you got through going over the boundaries of the claim, what did you do, Mr. Stafford?

A. I went on to the lower end of the claim to a gulch that came down through there, watercourse—

Q. How far was this gulch from the lower end line of Three, first tier, right limit?

A. Oh, possibly 50 or 100 feet; 150 feet, or 200 feet, perhaps.

(Testimony of Richard Stafford.)

Q. I'll ask you what you followed in going down there? A. I followed the blazes down there.

Q. Is that the same blazed line you follow in July when you were there?

A. It is the same direction, same decline I think.

Q. And then you went down to the northwest corner? A. Yes, sir.

Q. And you have already described that stake?

A. Yes, sir, that was a tree cut off, about four feet high.

Q. And that was the same stake you saw there in July? A. Same stake.

Q. Then, where did you go?

A. I went back to the center stake I think from there, lower center stake.

Q. Well, did you go on that occasion, to the southwest corner stake?

A. I went up that line coming back up the creek; I came up that line between the creek claim and the first tier of benches.

Q. From the—from what stake?

A. From the lower corner stake, downhill corner stake.

Q. Lower corner stake—what did you follow in going up there?

A. Oh, there was just a blazed line along there.

Q. And did you see any stake of No. 3 at the upper end? A. The upper corner stake, I saw that.

Q. That would be the southwest corner stake?

A. Yes, sir.

Q. I'll ask you to state whether or not that's the

(Testimony of Richard Stafford.)

same stake you saw there before in July.

A. It would be the same stake, I think.

Q. What did you see written on it then?

A. It was, there was marked—as near as I can recollect: "Corner stake of No. 3, first tier," and there was arrows pointing uphill to the center stake, and I believe there was 330 feet marked on it, I wouldn't be certain about that.

Q. Can you state whether or not there was arrows on all of the stakes?

A. I think there were. It was on some of them anyway, I wouldn't be sure whether it was on all of them or not.

Q. Now, I'll ask you if, from the stakes you saw there, the writings that you saw, the blazed lines that you saw there, upon that occasion, whether a prospector searching in good faith to determine the boundaries of that claim, could readily have determined what the boundaries of it were by tracing the boundaries on the ground?

A. I had no trouble; I think they could be easily traced.

Q. Well, after you got through going over the boundaries of the claim, what did you do, Mr. Stafford?

A. I went on to the lower end of the claim to a gulch that came down through there, watercourse—

Q. How far was this gulch from the lower end line of Three, first tier, right limit?

A. Oh, possibly 50 or 100 feet; 150 feet, or 200 feet, perhaps.

(Testimony of Richard Stafford.)

Q. From what would this gulch lead?

A. That gulch led from the hills and through—

Q. What side—from what side?

A. On the right limit of Dome Creek.

Q. State whether or not it run clear across this particular property.

A. It ran across the lower end of the claim; somewhere across the lower end of the claim, I think the full width of the claim.

Q. How deep was the draw that you saw there in 1904?

A. It would be from ten to fifteen feet deep, I should think.

Q. What did you do there, Mr. Stafford?

A. I done some prospecting there in that gulch—some panning.

Q. What did you have with you?

A. I had some tools with me.

Q. What tools did you have?

A. I had a gold-pan, and a pick and shovel.

Q. Where did you get them?

A. Why, the tools I had on Pedro.

Q. When did you carry them over there?

A. Oh, I carried them over early in the summer about June I should think, I used to—

Q. Where did you keep them?

A. Well, I used to prospect there, up around Golden and I had some things there I left there as a rule.

Q. When did you carry them to Dome Creek?

A. The morning that I went over, which would be

(Testimony of Richard Stafford.)

on the morning of the latter part of September, 1904.

Q. Now, just tell the jury what you did at the lower end of this claim at that time.

Mr. JENNINGS.—Now, if you will fix that time a little more definitely, what date?

Mr. McGINN.—About the 20th of September, would you say, or 15th?

A. It would be from the 15th to the last of September as near as I can recollect.

Q. It was a long time ago—1904?

A. Yes, sir, in 1904.

Mr. PRATT.—From the 15th to the 30th of September, all right.

Mr. McGINN.—What did you do?

A. I panned in that gulch; I panned several pans in that gulch there in different parts.

Q. What did you find as a result of your panning?

A. I found some gold there—particles of gold.

Q. How many pans did you pan?

A. I couldn't say as to that.

Q. Approximately?

A. I panned several pans, possibly half a dozen—maybe more.

Q. Where did you get the material that you panned there on that occasion?

A. Well, I panned from different parts in the gulch there; some from the bottom of the gulch, and I tried a pan or two further up on the sides of the gulch.

Q. What kind of material did you pan there at that time?

A. Well, the material is mostly fine sediment—silt

(Testimony of Richard Stafford.)

or whatever you call it—disintegrated rock, I would call it.

Q. What else—if anything?

A. Well, there was particles of coarser matter in it.

Q. Such as what?

A. Well, you would occasionally find pieces of angular rock.

Q. What size? A. O, generally small.

Q. What else?

A. Well, there was all kinds of material in it, but it was mostly a fine sediment as near as I know.

Q. I'll ask you to state whether or not, as a result of your pannings, you determined whether there was any black sand in that material?

A. Yes, I would say—

A. I would say there was black sand in it; yes.

Q. Was there any other kind of sand in it?

A. Well, you would get grey sand, and I should think ruby-sand and reddish sand, and black sand.

Q. Now, you say you panned about, several pans of black sand there?

A. Yes, I panned several pans of that material.

Q. What was the result of your panning? What gold did you find in each pan as near as you can tell?

A. I found some gold.

Q. In each pan?

A. Well, no, not in each pan; I don't think I found gold in some of the pans.

Q. You found gold in some of the pans?

A. Yes.

(Testimony of Richard Stafford.)

Q. Well, what kind of gold was it, as to being fine or coarse?

A. The gold was all fine gold I think, with one exception.

Q. What was that one exception?

A. I found a particle of quartz there, with a coarser particle of gold in it.

Q. What was the size of the piece of quartz with the piece of gold attached?

A. O, it was a small piece, the size of a piece of wheat, or pea, or something.

Q. Do you know what it was worth, the value of it?

A. No, I don't know.

Q. Did you do anything more there that day?

A. No, sir, I think not.

Q. When did you next—now, you have prospected a good deal you say, Mr. Stafford?

A. Well, some.

Q. How does a miner generally prospect?

A. Well, it depends on where he is prospecting, and what he is prospecting for, I think, all together.

Q. Well, just go on and tell that, Mr. Stafford.

A. Well, what are you going to prospect for?

Q. Well, suppose you are prospecting for placer?

A. Well, if I was prospecting, according to my own idea I would pan anywhere in any of the gulches or on the surface, or on the hillsides at the head of these creeks and see what indications I could find.

Q. Then if you found anything, what would you do?

A. Well, if it were anything that would encourage

(Testimony of Richard Stafford.)

you—if it was a deep creek I would sink of course and look for bedrock to see what it contained.

Q. Now, where did this—do you know what the width of the valley of Dome is?

A. Well, parts of it; along about discovery, I would judge would be three thousand feet—from two to three thousand feet wide perhaps, from hill to hill.

Q. From rim to rim—is that correct?

A. Not from rim to rim, from hill to hill, I would say.

Q. Where would this claim lie with reference to the middle of Dome Creek valley?

A. Well, No. 3 would be well in the center of the valley there.

Q. I'll ask you to state whether or not a prospector would take that matter into consideration?

A. I would myself.

Q. When were you next upon the property, Mr. Stafford?

A. I think about—O, I was next there in June, 1905, on that claim.

Q. Anybody with you? Anybody with you on that occasion?

A. Yes, there was a young fellow went over with me, I believe then.

Q. Did he go to this claim with you?

A. We went down the creek together; he didn't stay there.

Q. What did you do on that occasion—what part of June was that in 1905?

A. Well, it would be some time in June—maybe

(Testimony of Richard Stafford.)

the latter part of June.

The COURT.—Of what year?

Mr. McGINN.—1905.

A. Possibly about the 15th of June, somewhere around there.

Q. (Mr. PRATT.) Somewhere about the 15th?

A. Yes, sir.

Mr. McGINN.—What did you do there on that occasion, Mr. Stafford?

A. I went down to the claim and I stopped with a fellow on Discovery there for several days—that is, I stopped with him off and on there; I was on the creek off and on several times and I was down around that claim quite often, No. 3.

Q. I'll ask you to state whether or not on those various occasions you saw the stakes and lines of this claim No. 3, first tier right limit.

A. I did; I saw the stakes on different occasions.

Q. What stakes did you see?

A. Why, I saw the center end stakes, and the corners.

Q. Saw all six stakes?

A. Well, at that time I suppose I saw them; I saw some of them off and on at various times.

Q. They were standing, were they, just as you had seen them in the previous September?

A. They were—let's see; yes, they were all there in June, I know that.

Q. You saw them there? A. I saw them there.

Q. Well, did you do anything else when you were out there—I understand you were out there several

(Testimony of Richard Stafford.)

days on this occasion, and you went down several times? A. Yes, sir.

Q. You were stopping on discovery?

A. Yes, sir.

Q. Did you do anything else out on the property at that time?

A. Why, I panned on that ground different times.

Q. What part of it, and where?

A. I panned on the lower end of the claim.

Q. Where with reference to this draw?

A. In the draw, the same draw I had panned before.

Q. What was the result of your panning at this time?

A. Why, I found some colors of gold there.

Q. About how many colors did you find?

A. Well, there was a few colors; I couldn't say how many.

Q. Now, when you were there in 1904, what work if any had been done on Dome Creek?

A. In 1904?

Q. Yes. A. There had been several holes sank.

Q. Where with reference to this particular property, and about how far away?

A. Well, the holes that I saw were on the creek claims.

Q. About how far away were they from this property?

A. I couldn't possibly say, except around discovery there.

Q. How far would that be?

(Testimony of Richard Stafford.)

A. That would be, probably a mile from there.

Q. Probably a mile. Now when you were there in 1904, what work had been done on Dome Creek? In June? A. You mean 1905?

Q. Or 1905—yes; pardon me.

A. They had been some holes sank through the winter there; there was a hole on Three above of Dome, and on Four Below, second tier sank, and down around 5 second tier.

Q. Do you know whether there had been any holes sunk upon No. 1?

A. I believe there was a hole on No. 1.

Q. Now, this hole you speak of on No. 4, who sank that?

A. Well, there was a hole on the second tier off of Four, that was sunk to bedrock; they were working there in the spring of 1905, Graham & Pounder I believe sank that.

Q. Were they working there at the time you went out in June? A. Yes, they were working there.

Q. Do you know John Holmgren?

A. I know him by sight I believe.

Q. I'll ask you to state whether or not he was at that time with them?

A. Yes, Pounder & Graham were both there I think.

Q. State whether or not you saw the shaft that had been sunk by them, in June, 1905.

A. I was at the shaft on different occasions and saw it.

Q. I'll ask you to state whether or not at that time

(Testimony of Richard Stafford.)

you knew that pay had been found by them?

A. I knew that they had found pay there, yes, sir; they were sluicing when I was there.

Q. Sluicing in June, 1905?

A. Yes, sir, I think so.

Q. Now, how far was that shaft from the place you discovered gold in that draw?

A. Well, it would be from two or three hundred to four hundred feet.

Q. Four hundred feet. Had there been any other shaft sunk in that immediate vicinity?

Mr. PRATT.—That was Graham & Pounder he was talking about, this shaft?

Mr. McGINN.—Yes, sir, Graham & Pounder's. Now, just one moment, I'll ask you to refer to this plat—let Mr. Stafford see that (referring to Plffs. Exhibit No. 4). This being—these lines here which I will mark A, B, C, D and E, being supposed to represent the boundaries of the claim, of No. 3 as you saw it out there in 1904 and 1905; now where was it that that draw—this being the lower end of the claim?

A. (Witness points to map.) This is Three, first tier here?

Q. Yes, sir, this is Three first tier, here (indicating on plat).

A. Well, the draw runs across the claim in this direction (indicating on Plffs. Ex. 4) here, something like that, on the lower end.

Q. Now, do you know the—with reference to the corner marked "D"—the northeast corner of No. 3, first tier, right limit, where Pounder & Graham had

(Testimony of Richard Stafford.)

sunk their shaft?

A. Well, they had sank their shaft about this direction (indicating on said plat) from this corner of Three, I should think about there.

Q. This plat is upon a scale of one inch to 50 feet —one inch to 100 feet.

A. (Estimating on plat.) Why, the 100 feet will —it would be in this corner here somewhere.

Q. About how many feet from that stake?

A. It might be a hundred feet down-creek and not far from this line (indicating).

Q. Will you just mark that with this pencil?

A. It is a hundred feet to an inch.

Q. A hundred feet to the inch.

Mr. JENNINGS.—He is now locating the shaft of Pounder & Graham?

Mr. McGINN.—Yes, sir—mark that with the letter "F." (Witness marks.)

A. That's as near as I can say.

Q. And you say they were sluicing there when you were out there in June of 1904—of 1905?

A. Yes, sir.

Q. Now, what other work had been done in the immediate vicinity of this claim when you were out there in June, 1905?

A. Well, in June Cook and Ridenour—

A. In June Cook and Ridenour were working on the upper end of what we called No. 4 first tier,—they were sinking a shaft there.

Q. About how many feet from the lower line of Three?

(Testimony of Richard Stafford.)

A. Of Three—well, it might be fifty feet—forty or fifty feet I should say.

Q. Did—had you seen the shaft that had been put down on No. 1 Below by Cook and Ridenour?

A. I saw a shaft at different times; I don't know just at what time I did see it—I have been to the shaft different times.

Q. Do you know where Klonos and others had put a shaft down out there?

A. Yes, sir, I know they had a shaft when I was there; I was down to the shaft different times.

Q. Where was that shaft? Indicate it upon the plat (Plffs.' Ex. 4).

A. Well, I'm not very positive as to where it was, but I think it was on Four.

Q. This is upper Four, this is lower Four (indicating on said plat).

A. Well, it would be in here somewhere; I don't know whether they called it lower Four, or the upper end of Five.

Q. This is the dividing line between first and second tier (showing witness on plat). A. This line?

Q. Yes.

A. I think the hole would be in here (indicating).

A. I'm not sure about that point.

The COURT.—What do you mark that point?

Mr. McGINN.—With the letter "G."

Mr. PRATT.—What shaft is that now?

Mr. JENNINGS.—The Klonos shaft.

Mr. McGINN.—Now, do you know—you say a shaft had also been put down on No. 3 above?

(Testimony of Richard Stafford.)

A. Yes, sir.

Q. Do you know who had put that shaft down?

A. No; I only know that some French fellow, I believe, sank it that winter, the winter of 1904 or spring of 1905.

Q. Do you know whether or not any pay-dirt was found in that shaft? A. Yes, I know it was.

The COURT.—You said No. 3 above, creek claim?

Mr. McGINN.—Three above discovery, first tier, right limit?

A. Yes, sir.

Q. You say pay-dirt had been found there; do you know whether pay-dirt had been found in the shaft sunk by Klonos?

A. Yes, sir, I panned there; he asked me to pan there; Havery and Klonos I believe was there when I was there.

Q. Do you know whether any shafts were sunk on No. 2 first tier below, at that time?

A. No, not that I know of—in June.

Q. Do you know when Cook and Ridenour got to bedrock on this shaft they were sinking on Four?

A. It was some time that summer.

Q. Were you out there during that time?

A. I was out after they got to bedrock.

Q. Do you know whether they struck pay there?

A. Yes, I know they found pay there.

Q. Do you know whether Fritz Block put a shaft down on No. 2 in—during that summer?

A. No, sir, I do not know.

Q. I'll ask you to state if the finding of these colors

(Testimony of Richard Stafford.)

such as you have testified you found out there in this draw and within the boundaries of No. 3, first tier, right limit as described by you—the finding of these colors,—taking into consideration the location of that property with reference to the width of that valley, the fact that gold had been discovered above and in paying quantities, and gold discovered below it in paying quantities, and the fact that gold had also been found by Pounder & Graham within a hundred feet of the northeast corner or approximately within a hundred feet of the northeast corner of this location, whether the finding of those colors of gold would justify you as an ordinarily prudent man and not necessarily a skilled miner, in going ahead and spending more money in the further development of that property? A. It certainly would.

Q. It would justify you as a prudent man in doing so would it? A. Yes, sir.

Q. Did you ever pan there after that time?

A. Pan there after which time?

Q. After June, 1905?

A. Yes, I have panned on the claim afterwards.

Q. On the surface? A. No, I think—

Q. In the draw?

A. I think that I panned in—I panned in June different times there; the next time I panned there I guess would be when, on the Ness & Weimer lay in the winter—or summer, a year from that.

Mr. McGINN.—Now, I desire to offer in evidence a certified copy of a notice of location of U. G. Hastings.

Mr. JENNINGS.—That is, of course, subject to the general objection we made, but it will be taken up later.

The COURT.—Very well—do you want to examine it, Mr. Pratt?

Mr. PRATT.—Just one moment. (Examining offered paper.) We will make the formal objection that it is incompetent.

Objection overruled. Exception.

Mr. McGINN.—(Reading paper in evidence:)

[Defendants' Exhibit "C"—Notice of Location by W. C. Hastings.]

"No. 1478.

NOTICE OF LOCATION.

Claim No. 3 Below Side, R. Limit, on Dome Creek.

NOTICE IS HEREBY GIVEN that the undersigned has located 20 acres of placer mining ground situate in the Fairbanks Mining District, Third Judicial Division of Alaska, and described as follows, to wit:

1320 feet downstream along said Creek Claim No. 3 Below Discovery, on Dome Creek, 660 feet wide.

Discovered Jan. 2nd, 1904.

Located, Jan. 2/04.

W. G. HASTINGS, Locator."

Now, I will have to have that corrected; it says W. G. Hastings.

Mr. JENNINGS.—Oh, no, that is the same one.

Mr. McGINN.—The record shows it is "U. G. Hastings." It may be understood that is the same one.

(Testimony of Richard Stafford.)

The COURT.—Very well.

Mr. McGINN.—(Reading:) "Filed for record March 24, 1904, at 30 min. past 11 A. M.

JAS. TOD COWLES,
Commissioner and ex officio Recorder,
By John L. Long,
Deputy."

And then is attached the certificate that it is a true copy.

Said location notice of U. G. Hastings being received in evidence, and marked by the Clerk Defendants' Exhibit "C."

Q. Mr. Stafford, when you were out upon this property in June of 1905, state whether or not you saw any tent on it or in the near vicinity of it?

A. You mean on Three?

Q. Yes, sir.

A. On the lower end of Three, Cook and Ridenour, I believe, had a tent there; there was a tent there which I think they were living in.

Q. Can you state whether or not that tent was within the lines, the exterior boundaries of Three as you had seen them prior to that time?

A. To the best of my recollection it was just inside the line of Three, between the center stake and the upper downstream corner stake.

Q. When you saw the stakes there in that same month of June, 1905, that you testified to yesterday, did you notice anything about the upper center stake—any writing on it in June of 1905?

A. Yes, there was Hastings' location notice; there

(Testimony of Richard Stafford.)

was also writing on the other side of it, the upstream side of it—there was a location notice there.

Q. Do you know whose notice that was?

A. That was the Fritz Block location.

Q. That was a No. 2 location? A. Yes, sir.

Q. So it was on one and the same stake?

A. Yes, sir; one and the same stake.

Q. Now, Mr.—when were you next on the property out there after the summer of 1905?

A. I was there in December, 1905, at the latter end of December, I think.

Q. What did you do on that occasion?

A. Why, I didn't do anything particularly; I went down to—there was—I had let a lay on the ground, or two lays rather, and I went down to see what they had done.

Q. When were these lays given if you recall?

A. There was a lay given to Ness & Weimer about the first of November, I think, or the last of October—or November.

Q. Where did that ground—what did that lay cover?

A. It was on the lower 330 feet of the ground, No. 3.

Q. Had there any lays been ;et to any other persons or persons prior to that?

A. I had let a lay to Tracy Hope prior to that.

Q. When was that lay let?

A. That lay was let in September, 1905.

Q. Do you know what part of September?

A. No, I couldn't say; sometime in September,

(Testimony of Richard Stafford.)

possibly the first part of September.

Q. Did you pay the balance of this two hundred and fifty dollars to Mr. Hastings as is set forth in this agreement—this contract of sale?

A. Yes, sir.

Q. Did you receive a deed from him to the property? A. Yes, sir.

Mr. McGINN.—We desire now to introduce in evidence a certified copy of a deed from U. G. Hastings to Richard Stafford. (Handing paper to counsel for plaintiffs.)

Mr. PRATT.—If the Court please, we desire to object to the introduction of this deed on the ground that it is incompetent, immaterial and irrelevant; the specific objection being that before a mining claim comes into existence, the locator must stake the ground—mark the boundaries,—and must make a discovery; he must make it, or some one must make it on his behalf; and prior to the happening of those two events he has nothing to convey.

Now, there is no proof here that there was any discovery of gold made by Mr. Hastings or by anyone in his behalf prior to the date of this instrument; and there is no proof that he was in possession and trying to make a discovery. Those California cases that announce that extreme doctrine, that were combatted so vigorously by one of the members of that same court, it seems to us some suggestion was in the case of where the staker was in the actual possession and was proceeding diligently to make a discovery. Nothing of that kind appears here.

The COURT.—In any view of the case, Mr. Pratt, this deed is admissible under this evidence even if your contention as to the law is correct. I don't care to comment on the evidence.

Mr. PRATT.—We reserve the exact question to be presented later to the Court upon the authorities.

The COURT.—Very well, the objection may be overruled.

Plaintiffs except.

Mr. McGINN.—(Reading the offered instrument in evidence.)

[Defendants' Exhibit "D"—Instrument, Dated September 8, 1905, Hastings–Stafford.]

"No. 12164.

THIS INDENTURE, Made this 8th day of September in the year of our Lord one thousand nine hundred and five, between U. G. Hastings, of Cleary Creek, in the District of Alaska, the party of the first part, and Richard H. Stafford, of Fairbanks, Alaska, the party of the second part, WITNESSETH:

That the said party of the first part, for and in consideration of the sum of Two Hundred and fifty Dollars, lawful money of the United States of America, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part, and to his heirs and assigns,

Placer mining claim Number Three (3) below Discovery, first tier, right limit, on Dome Creek, in the Fairbanks Mining and Recording District, District of Alaska;

Together with all the metals, ores, gold and silver-bearing rock and earth therein, and all the rights, privileges thereto incident, or therewith usually had and enjoyed;

TO HAVE AND TO HOLD all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal, this the day and year first hereinbefore written.

(W) U. G. HASTINGS. (Seal)

Signed, sealed and delivered in the presence of:

J. J. ROGERS.

A. J. STEELE.

Properly acknowledged.

Filed for record Sept. 23, 1905, at 45 min. past 2 P. M.

E. M. CARR,

Commissioner and ex-officio Recorder.

By John L. Long,

Deputy.

Said instrument being received in evidence and marked by the Clerk Defendants' Exhibit "D," etc.

Mr. McGINN.—Now, will you answer that question, Mr. Stafford?

Mr. PRATT.—Your Honor, it seems to me the objection should be good as to the amount that was paid, and that is the objection; if he wants to show that the option was given we have no objection to that.

The COURT.—Well, if you're going into it at all,

(Testimony of Richard Stafford.)

that's the only purpose it can have, to show what it was considered by the people that took the option, that it was worth.

Q. Now, before receiving this deed, Mr. Stafford, did you give any other person or persons an option to *by* any of this property?

Objection overruled. Exception.

A. I sold a three-quarters interest about that time to Crawford, Miller, and de Journel.

Q. *Q*hat was the consideration? A. $1,500.00.

Q. Who retained the other interest?

A. I retained the other one-fourth.

Q. Do you know just when you did that?

A. No, it was some time about that time.

The COURT.—About what time—the execution of the deed? A. Yes, sir.

Mr. McGINN.—Had you given any option before that time—before receiving a deed from anyone?

A. Yes, sir; I had given an option to James McNamee.

Q. Was the option to McNamee, or a man by the name of Field? A. The option was to McNamee.

Q. What was the consideration? What was the amount of the purchase price mentioned in the option? A. It was two thousand dollars.

Q. When was that option given?

A. Some time in the latter part of August.

Q. Of nineteen five? A. Yes, sir.

Q. Do you know what became of that option?

A. No, I don't know what became of it; Miller &

de Journel had that option; it was an option they bought in.

Q. That's the option they bought under?

Mr. PRATT.—Who was that option to?

Mr. McGINN.—An option to McNamee, and also the option they bought under; I will show that more clearly by Mr.—I desire to introduce in evidence certified copy of a deed dated September 23d, 1905, between Richard Stafford and R. M. Crawford, H. J. Miller, and Jeanne de Journel.

Mr. McGINN.—(Reading instrument in evidence:)

[Defendants' Exhibit "E"—Instrument, Dated September 23, 1905, Stafford–Crawford et al.]

"No. 17297.

THIS INDENTURE Made the 23rd day of September A. D., 1905, between Richard Stafford, party of the first part, and R. M. Crawford, H. J. Miller, and Jeanne de Journel, parties of the second part, WITNESSETH:

That the said party of the first part, for and in consideration of the sum of two thousand dollars, in lawful money of the United States, to him in hand paid by the parties of the second part (the receipt whereof is hereby acknowledged), has remised, released and quit-claimed, and does hereby remise, release, and forever quit-claim unto the said parties of the second part, their heirs and assigns, an undivided (¾) three-quarters interest in and to all and singular that certain piece or parcel of land and premises described as follows, to wit:

Placer Mining Claim Number Three (3) Below Discovery, first tier, right limit on Dome Creek, in the Fairbanks Recording District, in the District of Alaska, containing 20 acres, more or less, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the rights, privileges and franchises incident thereto, and the rents, issues and profits thereof.

TO HAVE AND TO HOLD the said premises, together with the appurtenances, unto the said parties of the second part, their heirs, executors, administrators and assigns Forever.

IN WITNESS WHEREOF the said party of the first part has hereunto set his hand and seal the day and year herein first mentioned.

RICHARD STAFFORD. (Seal.)

Signed, sealed and delivered in the presence of:

JEREMIAH COUSBY.

FERNAND DE JOURNEL.

Properly acknowledged.

Filed for record Jan. 4th, 1907, at 35 min. past 10 A. M.

G. B. IRWIN,
Recorder.
By John L. Long,
Deputy.

Then there is the certificate of the Commissioner that it is a true and correct copy of the instrument recorded in Volume 8 of Deeds at page 23. We ask that this be marked Defendants' Exhibit "E."

The COURT.—It may be so marked. (Instru-

(Testimony of Richard Stafford.)

ment so marked by Clerk.)

Mr. McGINN.—Do you know whether that instrument was executed on the 23d day of September, 1905? A. It was executed on that day.

Q. And what became of it, do you remember, Mr. Stafford?

A. The deed was placed for a while in the Bank, and then it was in care of de Journel.

Q. Placed in escrow, was it?

A. Yes, sir; in trust.

Q. Did you afterwards sell—what became of your quarter interest in this property, Mr. Stafford?

A. I afterwards sold my quarter interest to—

Q. To who? A. To Thomas P. Aitken.

Q. For what consideration?

A. Ten thousand dollars.

Q. Do you remember the date?

A. It was in—it was in December or possibly the first of January in—

Mr. McGINN.—We desire now to introduce in evidence a certified copy of deed from Richard Stafford to T. P. Aitken, but I notice the consideration mentioned in the deed is $5,000.00—that was the correct consideration, was it?

A. Yes, sir; that consideration was put in at his suggestion; the true consideration *through,* was ten thousand dollars.

(Mr. McGinn reads instrument in evidence as follows:)

[Plaintiffs' (Defendants') Exhibit "F"—Quitclaim Deed.]

"17433

QUITCLAIM DEED.

THIS INDENTURE, Made this 18th day of December, A. D. 1906, between R. H. Stafford, of Fairbanks, Alaska, the party of the first part, and Thos. P. Aitken of Cleary, Alaska, party of the second part,

WITNESSETH: That the said party of the first part, for and in consideration of the sum of five thousand dollars ($5,000.00) lawful money of the United States of America, to me in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents remise, release, and forever quit-claim unto the said party of the second part, and to his heirs and assigns, the following described placer mining ground, situate, lying and being in the Fairbanks Mining and Recording District, District of Alaska, particularly bounded and described as follows, to wit:

All my right, title, and interest in Placer Mining Claim Number Three (3) below Discovery, first tier, right limit, Dome Creek, Fairbanks Mining and Recording District, District of Alaska. Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

TO HAVE AND TO HOLD all and singular the said premises, together with the appurtenances, unto

the said party of the second part and to his heirs and assigns forever.

IN WITNESS WHEREOF the said party of the first part has hereunto set his hand and seal the day and year first above written.

R. H. STAFFORD. (Seal)

Signed, sealed and delivered in presence of:

F. C. KRAUSE.

A. V. KRAUSE.

Properly acknowledged.

Filed for record Jan. 16th, 1907, at 2 P. M.

G. B. ERWIN,
Recorder.

By Henry T. Ray,
Deputy."

Then follows the certificate of the commissioner that it is a true copy of the deed of record (Vol. 8, p. 57, Records of Fairbanks Recording District). We ask that this be marked Plaintiffs' (Defendants') Exhibit "F."

The COURT.—It may be so marked.

Whereupon the Clerk marked said deed in evidence "Defendants' Exhibit F," etc.

Mr. McGINN.—We desire now to introduce a deed from Thomas P. Aitken, to R. C. Wood.

(Mr. McGinn reads said offered instrument in evidence as follows):

[Defendants' Exhibit "G"—Instrument, Dated January 15, 1907, Aitken—Wood.]

"17435.

THIS INDENTURE, Made the 15th day of January, in the year of our Lord one thousand nine hun-

dred and seven, between Thomas P. Aitken of Fairbanks, Alaska, party of the first part, and R. C. Wood of Fairbanks, Alaska, the party of the second part,

WITNESSETH: That the said party of the first part, for and in consideration of the sum of one dollar ($1.00) and other good and valuable considerations, Gold Coin of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part, and to his heirs and assigns, all of his right, title, and interest in and to the following described mining property, located on Dome Creek, a tributary of Chatanika River, in the Fairbanks Recording District of Alaska, to wit:

That certain Placer Mining Claim known as Number Three (3) below Discovery, on the first tier of benches, right limit, on said Dome Creek, the said property being the same as that heretofore conveyed to the said party of the first part by Richard H. Stafford, together with all the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever as well in law as in equity to the said party of the first part, of, in or to said premises, and every part and parcel thereof, with the appurtenances.

TO HAVE AND TO HOLD all and singular the said premises, together with the appurtenances and privileges thereunto incident, unto the said party of the second part, and to his heirs and assigns Forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto set hands and seal the day and year first above written.

THOMAS P. AITKEN. (Seal)

Signed, sealed and delivered in presence of:

SAMUEL A. BONNIFIELD.

J. L. McGINN.

Proper acknowledged.

Filed for record January 16, 1907, at 2 P. M.

G. B. ERWIN,
Recorder.

By Henry T. Ray,
Deputy."

Notarial Seal—and then follows the certificate of the Commissioner that it is a true and correct copy of the deed as it appears in Vol. 8 of Deeds at page 59.

The COURT.—It may be admitted and marked.

Marked by the Clerk Defendants' Exhibit "G," etc.

Mr. McGINN.—Now, we desire to introduce in evidence a deed dated December 15th, 1905 (?), of R. C. Wood—(starts to read).

Mr. PRATT.—Well, wait a minute, will you—just make your offer, will you, so we can object. We object to that as incompetent, irrelevant and immaterial, and we call attention specifically to the fact

that this deed is dated in December, 1909, and this action was commenced March 3, 1909. Certainly they can't introduce deeds subsequent to—

The COURT.—Oh, yes, I think so, Mr. Pratt. I think the law is clear on that—objection overruled.

Mr. PRATT.—Sir?

Mr. McGINN.—An outstanding title in somebody else can be shown.

Mr. PRATT.—Doesn't that relate to the date of the commencement of the action?

The COURT.—I don't think so—not in ejectment proceedings.

Plaintiffs except.

Mr. McGINN.—(Reading offered instrument in evidence:)

[Defendants' Exhibit "H"—Instrument, Dated September 15, 1909, Wood—Sullivan et al.]

"THIS INDENTURE, Made this 15th day of December, 1909, by and between R. C. Wood of Fairbanks Alaska, party of the first part, and M. L. Sullivan, John L. McGinn, E. T. Barnette, J. C. Ridenour, and Henry Cook, parties of the second part.

WITNESSETH: That the said party of the first part, for and in consideration of the sum of One Dollar and other good and valuable considerations to him in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release and forever quitclaim unto the said parties of the second part, and to their heirs and assigns, all of his right, title, and

interest in and to the following described mining property, located on Dome Creek, a tributary of the Chatanika River, in Fairbanks Recording District, District of Alaska, to wit:

That certain placer mining claim known as Number Three Below Discovery, on the first tier of benches and right limit of said Dome Creek, the said property being the same as that heretofore conveyed to the said party of the first part by Thomas P. Aitken, together with all of the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the rents, issues, and profits thereof, and also the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said party of the first part, of, in, and to the said premises and every part and parcel thereof, with the appurtenances.

TO HAVE AND TO HOLD all and singular the said premises, together with the appurtenances and privileges thereunto incident, unto the said parties of the second part, and to their heirs and assigns, Forever.

IN WITNESS WHEREOF the said party of the first part has hereunto set his hand and seal the day and year first above written.

R. C. WOOD. (Seal)

In the presence of:

ARTHUR FRAME.

EDITH L. McCORMICK.

Properly acknowledged.

We ask that this deed be marked Defendants' Exhibit "H."

The COURT.—It may be so marked.

Said deed being marked by the Clerk Defendants' Exhibit "H," etc.

Mr. McGINN.—Now, I desire to introduce in evidence a deed from Miller, de Journel, Jeanne de Journel, and Deetering, parties of the first part, to E. T. Barnette, Henry Cook, J. C. Ridenour, M. L. Sullivan and John L. McGinn, parties of the second part.

[Defendants' Exhibit "I"—Instrument, Dated September 12, 1908, Miller et al.—Barnette et al.]

"24432.

THIS INDENTURE, Made and entered into this 12th day September, 1908, by and between H. J. Miller, F. de Journel and Jeanne de Journel, his wife, R. M. Crawford, and William Deetering, parties of the first part, and E. T. Barnette, Henry Cook, J. C. Ridenour, M. L. Sullivan, and John L. McGinn, parties of the second part,

WITNESSETH: That the parties of the first part, for and in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations to them in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, and convey unto the parties of the second part, all of their right, title, and interest in and to that certain placer mining claim situate on Dome Creek in the Fairbanks Recording District, Territory of Alaska, more particularly described as follows, to wit:

Certain Placer Mining Claim known as Bench Claim Number 3 below Discovery, on the first tier, right limit, of Dome Creek, said claim adjoining

Creek Claim Number 3 below Discovery on Dome Creek, and immaediately below Bench Claim Number 2 below Discovery on the right limit of said Dome Creek, which said Bench Claim Number 3 was located by W. G. Hastings''—now they have got it "W. G. Hastings'' again; it should be U. G. Hastings—I am satisfied it should be corrected in the record.

Mr. PRATT.—O, I think there is no doubt it is the same one.

Mr. McGINN.—Continuing: "Located by U. G. Hastings on January 2d, 1904, and recorded in Volume 2, on page 301 of the records of location notices now in the office of the Recorder of the Fairbanks Recording District, Territory of Alaska, reference to which notice of location is hereby made for the purpose of more particularly describing said property.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, rents, issues and profits thereof.

TO HAVE AND TO HOLD the above granted and described premises, with the appurtenances, unto the said parties of the second part, their heirs and assigns Forever.

And the said parties of the first part, for themselves, their heirs, executors and administrators, do hereby covenant and agree to and with the said parties of the second part, their heirs and assigns, that they or either of them has not made, done, committed, executed or suffered any act or acts, thing or things

whatsoever, whereby or by means whereof the said premises or any part or parcel thereof, now or at any time hereafter shall or may be charged or encumbered in any manner or way whatsoever, save and except two leasehold estates now existing against said property, one in favor of C. B. Atwell and J. E. Riley, and the other in favor of J. L. Weimer and Andrew Ness, and that said parties of the second part, their heirs and assigns, shall and may at all times, hereafter peacably and quietly have, hold, use, occupy, possess and enjoy the above granted premises and every part or parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said parties of the first part, their heirs and assigns, or of any other person or persons lawfully claiming or to claim the same by, through, or under the said parties of the first part, and that said premises are now free, discharged, and unencumbered of and from all former and other grants, titles, charges, estates, judgments, encumbrances of whatever kind soever, made, granted, created, or existing by virtue of any other acts of the parties of the first part, save and except as to the leashold estates hereinbefore mentioned.

JEANNE de JOURNEL. (Seal)
FERNAND de JOURNEL. (Seal)
R. M. CRAWFORD. (Seal)
H. J. MILLER. (Seal)
WILLIAM DEETERING. (Seal)

Signed, sealed and delivered in the presence of:

S. ASHEIM.
——— ROSENDAHL.

Properly acknowledged.

(Testimony of Richard Stafford.)

Filed for record September 14th, 1908, at 5 min. past 9 A. M.

H. J. MILLER,
Recorder.
By Henry T. Ray,
Deputy."

Then follows the certificate as to the record, Volume 11 of the Deeds, page 617. We ask that this be marked Defendants' Exhibit "I."

The COURT.—It may be so marked.

Whereupon the Clerk marked said instrument in evidence as Defendants' Exhibit "I," etc.

Mr. McGINN.—Now, Mr. Stafford, when did you next see the stakes—that is, particularly see the stakes of No. 3, first tier, after you were out there in December, 1905—in December, 1905, did you pay any attention to the stakes there at that time?

A. No, I didn't go around the stakes.

Q. You wanted to see—

A. I wanted to see if there was any work done on the claim and that it was represented.

Q. State whether or not the work was done.

A. There was work done on the lower end of the claim by Weimer & Ness.

Q. What work?

A. They had a cabin built there, and a hole sank quite a distance.

Q. You think that was about the first of December?

A. Well, now, it was in December—the latter part of December, I think.

(Testimony of Richard Stafford.)

Q. How deep was their hole at that time?

A. Well, their hole would be possibly from 20 to 60 feet if cleaned out, I should think.

Q. State whether or not that work was of more than the value of one hundred dollars.

A. Yes, sir.

Q. And whether or not it was within the boundaries of this property you have testified concerning?

A. Yes, sir, it was.

Q. How long did you remain there, Mr. Stafford?

A. I didn't remain there but a short time.

Q. When were you next out there?

A. I went over in March, I think, 1906.

Q. Did you go then to this claim? A. Yes, sir.

Q. What did you do there on that occasion?

A. I went over there about the first of March; we were going to have the claim surveyed, and there was some dispute about the upper line—the uphill line, there were other parties working there.

Q. Who were those other parties?

A. The parties on the second tier of benches, Perry was one—Perry & Westby, I think.

Q. That's Captain Westby, that used to be chief of police here? A. Yes, sir.

Q. And Tom Perry isn't it—you call him Tom Perry, don't you? A. I couldn't say.

Q. Where were they working?

A. Working on the second tier of benches, opposite to No. 3.

Q. Will you indicate upon this plat that has been marked Plaintiffs' Exhibit 4 just about where

(Testimony of Richard Stafford.)

Westby & Perry were working at that time?

A. They would be working, I would judge, on this property—let's see. (Pointing to said exhibit.) This is Two right here, isn't it?

Q. No, this is Four; this is Three (counsel indicates); here is where the lines of Two came down.

A. Well, I think they were working, as near as I could judge, in here (indicating) in this lower No. 3.

Q. Well, wasn't it upon this disputed ground—this piece of ground here (indicating) on upper Three instead of lower Three?

A. Well, I know they were 330 feet—the first lay—from the lower end of Three, and Atwell had a lay of 660 feet.

Q. Six hundred and sixty feet from there up; and it was about in the middle of Atwell's lay that they were working across the line? A. Well—

Q. He has got it right—where is that rule, your Honor? (Gets ruler from Court.) You say Weimer & Ness had 300 feet?

A. They had three hundred and some feet, and there is a fraction in there—it is longer on that side of the claim *was*—that is they were to have 100 feet more, which would be 400 feet.

Q. They would have about 400 feet?

A. Yes, sir.

Q. And then Atwell & Riley had—

A. The Atwell & Riley lay started at 330 feet from the upstream line and extended six hundred and sixty feet downstream.

Q. That would be about there, wouldn't it (meas-

(Testimony of Richard Stafford.)

uring with ruler on plat), about there? 600 feet, that would be about the boundary, wouldn't it, Mr. Stafford, approximately? A. I should judge.

Q. This would be about right (indicating to jury).

Q. Now, where were Perry & Westby working about that time?

A. They were working, on that map it would be upper No. 3, about fifty or a hundred feet from the line of No. 3 first tier; they were working on the second tier.

Q. That is, above this line (indicating)?

A. Yes, sir.

Q. Uphill from that line? A. Yes, sir.

Q. Well, what did you do out there on that occasion?

A. I established some stakes between—along that line—to show them the boundaries.

Q. How many stakes did you establish?

A. Why, I put stakes along there every little distance; I couldn't say how many—temporary stakes.

Q. When you were out there in December, did you notice whether anybody else had staked the property at that time?

A. No, I didn't look at the stakes at that time.

Q. Didn't look over the stakes at that time?

A. No, sir.

Q. Did you pay any particular attention to the stakes in March, 1906, when you were there?

A. Yes, sir.

Q. Did you go to all of the stakes?

A. I went to all of them except the lower corner

(Testimony of Richard Stafford.)

had disappeared—the lower uphill corner stake.

Q. That would be the northeast corner stake?

A. Yes, sir, the northeast corner stake.

Q. That had disappeared? A. Yes, sir.

Q. And with that exception, were all the stakes standing there? A. They were.

Q. Well, did you establish any corner stake there at that time, in March, 1906.

A. I set a corner stake there in March—in the first part of March, 1906; later on we had that claim surveyed properly, probably two weeks later, or three weeks.

Q. Now, in March, 1906, did you place any writings on any of the other stakes? A. In March?

Q. Yes, sir. A. No, sir.

Q. That is, the only stake you placed any writing, you established that stake there and you wrote upon it, did you? A. Yes, sir, I wrote—

Q. What did you write on it?

A. Corner Stake No. 3, first tier—lower corner stake No. 3, first tier bench.

Q. How long were you out there in March?

A. I was out there a couple of days in the fore part of March, the time I speak about.

Q. Did you return again there in March?

A. I went back in March, yes, sir.

Q. Anybody with you?

A. I went over from Fairbanks with the surveyor, Jackson, and Nate Zeimer, and Prosser went along from discovery on Dome down to No. 3.

Q. Is that the time Mr. Jackson surveyed the

(Testimony of Richard Stafford.)

claim? A. Yes, sir.

Q. Do you know whether that was March, or April?

A. Well, it would be possibly in April; the snow was melting at the time, and there was considerable water in some of these draws.

Q. Did you know William Woodward?

A. Yes, sir.

Q. State whether or not he was with you on that occasion.

A. We had Woodward come over from Little Eldorado where he was working; he came around by the mouth of Dome up to No. 3.

Q. Now, just state what occurred there that day, and what was done.

Q. Start in and tell what you did—you started in at the upper center initial stake?

A. We started from the upper center initial stake.

Q. Did you see any writings on that when you were there in 1906—March, 1906, with Woodward?

A. Yes, sir.

Q. What was the writings at that time?

A. The location notice of U. G. Hastings was written on the stake. On the opposite of the stake I think, on the No. 2 side, was Fritz Block's location.

Q. I'll ask you to state whether that was the same writing you saw on that stake in September, 1904, when you were out there.

A. It was the same writing.

Q. And the same writing you saw when you were there in June of 1905?

(Testimony of Richard Stafford.)

The COURT.—Now, what stake is this?

Mr. McGINN.—Upper center stake, initial stake.

The WITNESS.—The initial stake.

Mr. McGINN.—State whether the writing could be plainly read—or easily read.

A. It wasn't extra good writing; you could read it plainly.

Q. The pencil marks were clear were they?

A. Yes, sir.

Q. You have already described that stake Mr. Stafford? A. Yes, sir.

Q. Then, from that stake where did you go?

A. I think we went to the southeast corner stake, the uphill corner stake, upstream.

Q. Who went with you?

A. Why, Woodward and Mr. Jackson.

Q. And what did Mr. Woodward do if anything—not what he said—

Q. Well, he pointed out the stake, did he? Leave out the identification? A. Yes, sir.

Q. Did you see that stake? A. Yes, I did.

Q. Did you see what was written on it?

A. There wasn't much writing on it there at that time.

Q. Why Mr. Stafford?

A. There had been other markings put on that stake.

Mr. McGINN.—You say that part of the writing had been obliterated?

A. Yes, sir.

The COURT.— * * * What was left would

(Testimony of Richard Stafford.)

indicate what claim it referred to, not what was obliterated.

Mr. McGINN.—Reading the question, it is the same one way or the other—well, what was left on the stake? Of course, that makes it bad, because he says there was so many writings there. Were there any writings there on the stake that pertained to No. 3 claim, right limit?

A. It was marked "No. 3, first tier," is all I remember of at the time.

Mr. McGINN.—You had seen that stake before?

A. Yes, sir.

Q. When had you seen it?

A. Different times before.

Q. You saw it in September, 1904?

A. No, sir, I think not—yes, in September, 1904.

Q. And June—

A. Yes, sir, June of 1905, different times—and in July.

Q. And was this writing you saw on the stake as you say when you were there with Woodward, a part of the same writing that you saw in June, 1905?

A. I should say it was.

Q. Do you remember what part had been obliterated?

A. No, I couldn't say what part had been obliterated.

Q. That was obliterated as a result of the elements was it, that is, the rain and air, or was it scratched out?

A. Well, it was—there had been other parties blaz-

(Testimony of Richard Stafford.)

ing and they had cut some of these stakes off.

Q. And in doing that, they cut off part of the writing?

A. They obliterated part of this writing that was on.

Q. I believe you testified Mr. Woodward pointed that stake out? A. Yes, sir.

Q. Now from there where did you go?

A. We went to the southwest corner stake, downhill.

Q. The southwest corner? A. Yes, sir.

Q. That would be the upstream corner next to the creek—the creek claim? A. Yes, sir.

Q. What kind of a stake did you see there in April of 1906? A. A stake there about four feet tall.

Q. What did Mr. Woodward do with reference to that stake, if anything?

A. He pointed out that stake as—

Mr. PRATT.—Wait a moment—we object to what he pointed it out as.

Mr. McGINN.—Just stop there—he pointed it out—did you look at that stake at that time?

A. Yes, sir.

Q. What did you see written upon it?

A. "Corner stake of No. 3, first tier," and there was arrows on the stake 330 feet marked on one side, and 1320 feet pointing the other way.

Q. What way did it point, upstream or downstream 1320 feet? A. Downstream and uphill.

Q. And the 330 feet was uphill in the direction of the center stake? A. Yes, sir.

(Testimony of Richard Stafford.)

Q. Was there anything upon that that you recall?

A. I think not, on the corner stake.

Q. What kind of a stake was that?

A. That was a tree squared off about four feet high.

Q. Was there any other writings on the other side of that stake that you paid any attention to?

A. I didn't notice any other writings on that stake, no, sir.

Q. I'll ask you to state whether or not you saw that stake in September of 1904 when you were out upon the ground?

A. Yes, sir, I saw the same stake.

Q. The same stake? A. Yes, sir.

Q. The stake standing in the same place as when you were there in 1906 with Jackson and Mr. Woodward? A. Yes, sir.

Q. You also saw that stake there in June of 1905?

A. Yes, sir, I did.

Q. Had it been hurt in any way?

A. No, I think that stake was as it had been.

Q. The writing was—could be easily seen?

A. Yes, sir.

Q. Easily read? A. Yes, sir.

Q. Now, from there where did you go, you and Mr. Jackson and Mr. Woodward?

A. We went down the line from there to the northwest corner.

Q. That's the stake you say you established there in March—or—no, that's next the creek claim also, isn't it? A. Yes, sir.

(Testimony of Richard Stafford.)

Q. What did Mr. Woodward do there, if anything?

A. He pointed that stake out.

Q. What stake did he point out?

A. The northeast—or northwest corner stake, claim No. 3 first tier.

Q. What was written upon that stake?

A. "Corner Stake No. 3 first tier"; there was also arrows pointing in the direction uphill and upstream.

Q. How many feet upstream?

A. I think 1300 feet upstream—1320—and 330 feet uphill.

Q. Is that the same stake that you had seen there in June—or September of 1904?

A. It's the same stake.

Q. You first saw that stake in July, did you, 1904?

A. In July and September, 1904, and June of 1905.

Q. The stake in about the same condition as when you saw it in those years? A. Yes, sir.

Q. Had no trouble in reading them? A. No, sir.

Q. State whether or not it was a burnt stake.

A. No, it wasn't burnt.

Q. There had been a fire through there, Mr. —

A. There had been a fire over that country, yes, sir.

Q. Was that before or after this claim was staked? Claim No. 3?

Q. Well, I don't care anything about it—then from there where did you go?

A. We went to the lower center stake.

Q. Lower center stake? A. Yes, sir.

Q. Was that—did—what did Mr. Woodward do with reference to that stake?

(Testimony of Richard Stafford.)

A. He pointed that stake out.

Q. And what kind of a stake was it?

A. That was a tree squared off about four feet high.

Q. Was that the same stake you saw there in June and September—or July and September, 1904, and June of 1905? A. Yes, sir.

Q. Did it have the same writings upon it?

A. Yes, it had the same writings—

Q. Well, what did it have upon it?

A. It had "Lower center end stake No. 3 first tier, bench."

Q. That was the same stake you had seen there before? A. Same stake.

Q. And then from there where did you go?

A. We went uphill, and established the southeast corner stake.

Q. Or the northeast corner?

A. Well,—the northeast corner stake, it was.

Q. Well, had you established a stake before there, in March?

A. I had set a temporary stake up there.

Q. This time you established the permanent stake?

A. Yes, sir.

Q. What kind of a stake did you establish there?

A. A stake about four feet high, three or four inches square.

Q. And what did you write upon it?

A. We wrote "The corner stake of"—we wrote "The northwest—the northeast corner stake, No. 3, first tier." I believe Jackson wrote on the stake also.

(Testimony of Richard Stafford.)

Q. Now, in that vicinity, I'll ask you to state whether or not you saw a road along there.

A. O, there was a road that ran from just below that corner stake, ran across the lower end of the claim.

Q. Do you know whether or not it ran along the line on the lower end of the claim?

A. Right along close to the line.

Q. When did you first see that road there?

A. Well, there was a road there in June, 1905.

Q. That's the first time you saw it. Now, was this tent you say you saw there above or below that road—upstream or downstream?

A. Well, in 1905 in June there was a tent on the uphill—on the upstream side of the road on No. 3.

Q. On No. 3? A. Yes, sir.

Q. You're sure that tent was on No. 3 Mr. Stafford?

A. Yes, sir, I'm sure it was on—it was inside my location, I know that.

Q. Now, Mr. Stafford, since you sold out to Mr. Aitken in 1906, I'll ask you to state whether you have any interest of whatsoever nature in that property out there?

A. No, sir, I have no interest whatever.

Q. Have you any interest at the present time in the outcome of this lawsuit in any way? A. No, sir.

Q. That's all. O, just one moment—Mr. Stafford, do you know where William Woodward is at the present time?

A. I don't know where he is; he is outside some-

(Testimony of Richard Stafford.)

where I believe. That's all.

Cross-examination.

By Mr. PRATT.—He had lived here right along until just this last year, hadn't he?

A. He lived here off and on until I know last summer he left; he told me he was going to Central America.

Q. What is your native state?

A. I was born in Canada.

Q. Sir? A. I was born in Canada.

Q. In Canada? A. Yes, sir.

Q. When did you come over to Alaska?

A. I came to Alaska—into this part of Alaska, in the summer of 1904.

Q. 1904. Where did you come from?

A. I came from Dawson, Yukon Territory.

Q. How long did you stay in the Dawson country?

A. I had been there since the Spring of 1908.

Q. 1898 you mean? A. Ninety-eight, yes, sir.

Q. Eighteen and ninety-eight? A. Yes, sir.

Q. What business did you follow there?

A. I had been mining there.

Q. Mining? A. Yes, sir.

Q. Mine-worker, or prospecting—Mine-worker or prospector?

A. Prospecting some of the time, and I was mining most of the time.

Q. When you came down here, you hadn't had very much experience prospecting, had you?

A. Well, just those few years I was in Dawson.

Q. Well, you only prospected there at intervals,

(Testimony of Richard Stafford.)

while you were in the Dawson country?

A. Yes, sir.

Q. Most of the time you was a mine-worker—that it? A. Yes, quite a good deal—most of the time.

Q. Did you follow any other business in Dawson besides working in mines? A. No, sir.

Q. And at intervals you prospected?

A. Yes, sir.

Q. How much time do you say you put in up there prospecting? A. Two years, I should think.

Q. Two years at that time? A. Yes, sir.

Q. Did you locate ground up there?

A. Yes, sir, I located some ground.

Q. Many claims, or few?

A. I located several claims.

Q. Several claims. Now, in that country you didn't—there was no such thing as discovery of gold was there? That didn't have anything to do with a mining title there, did it? A. No, sir.

Q. So the first experience you had with reference to staking claims and making a discovery under the American law, was when you come down here in 1904, wasn't it? A. Yes, sir.

Q. Where did you go to live first, after you got here? A. I lived in town here first.

Q. When did you first go out to Dome Creek now, for the purpose of prospecting with the idea in your head of staking ground and making a discovery of mineral? A. In July, I believe, 1904.

Q. Where were you living at that time?

A. I was living most anywhere at that time.

(Testimony of Richard Stafford.)

Q. Well, where did you start from when you went out there? A. I started from town.

Q. From this town? A. Yes, sir.

Q. Did anybody go with you?

A. I don't think there was anyone with me that I know.

Q. Where did you go first on Dome Creek?

A. I first came down to Dome Creek, I came across from Eldorado and came down the ridge, and went down about the lower end of Dome Creek.

Q. The lower end of it? A. Yes, sir.

Q. And then you came up the creek?

A. Yes, sir.

Q. Were these creek claims located at that time?

A. Yes, sir.

Q. They were sinking holes on those creek claims as you passed up were they?

A. No, sir, they were not.

Q. None of them?

A. I didn't see any of them sinking while I was there.

Q. Well, when you got up to this No. 3 bench, didn't you tell the jury that you saw some stakes there showing that Three Bench had been located by somebody? A. Yes, sir.

Q. Where were you travelling at the time you saw the first stake with reference to Three, along the creek claims or on the benches?

A. I was travelling mostly between the creek claims and the benches.

Q. Along the benches; now what was the first stake

(Testimony of Richard Stafford.)

that you saw that had any reference to the first tier of benches?

A. Why, there were stakes where I first come down on the creek.

Q. Where?

A. I should think 10 or 12 Below.

Q. Oh, no—

Mr. McGINN.—That's an answer to your question.

Mr. PRATT.—Just read that question. (Question re-read by reporter.) Three Bench—I left that out.

A. I think the lower center stake would be the first stake.

Q. The lower center stake? A. Yes, sir.

Q. Now, at that time you were not travelling between the creek and first tier of benches, were you?

A. I was travelling all sorts of shapes, up the creek.

Q. Yes. And that was the first stake that had any reference to the first tier of benches off Three you say? A. Off Three, yes, sir.

Q. Now, what called your attention to that?

A. Nothing particularly, except that I was looking along there to see if there was any vacant ground; I wanted to locate some of it myself.

Q. Yes. Had you seen the northwest corner of the first tier of benches off Three, before you saw the lower center?

A. I couldn't say now; I believe I come to the center stake first.

Q. Center stake first? A. Yes, sir.

(Testimony of Richard Stafford.)

Q. Now, what do you claim you saw on that center stake?

A. Well, it was marked, I believe, "Lower center stake of No. 3 first tier."

Q. Which side of that stake was that notice on?

A. On the uphill—on the upstream side, I believe.

Q. Upstream side—any name signed to it?

A. I couldn't say that there were.

Q. Couldn't say there was? Very short notice, was it—lower stake No. 3 Below, first tier—that's about all there was to it, wasn't it?

A. There was I believe other writing on that stake also.

Q. Can you remember what it was?

A. No, I could not.

Q. Your impression is now, there was no name signed to it, ain't it?

A. I wouldn't say whether it was signed or not—that is, Hastings' name.

Q. Well, you don't want to tell this jury that any name was signed there, do you?

A. No, I wouldn't tell them any name was signed there.

Q. And if there was any name signed there, you don't want to tell them it was U. G. Hastings' either?

A. No, sir.

Q. No, sir. Now, where did you go from that center stake? A. Across, towards the corner—

Q. When you saw that initial stake, did you think somebody had taken up the first tier of benches?

A. I did.

(Testimony of Richard Stafford.)

Q. So you went across to the corner stake to see that? A. Yes, sir.

Q. Now, what did you find there that had reference to the first tier of benches off Three?

A. There was a corner stake there of 3 and 4 first tiers, and some creek corners, three or four stakes there together.

Q. All badly burnt, were they?

A. Some of them were burnt and some of them weren't.

Q. You saw one there that wasn't burnt, did you?

A. I believe so, yes.

Q. Sure of that?

A. The stake might have been burnt, but the writing wasn't burnt.

Q. Was it a fresh blaze?

A. Well, I couldn't say about the freshness.

Q. Anyway, it might have been an old blaze.

A. Might have been.

Q. Now, what do you claim you saw on that that had reference to the first tier of benches? No? Three Bench?

A. Corner stake, marked "Corner stake, No. 3 first tier."

Q. Anything else?

A. I believe it was marked "On Dome," there was an arrow pointing one way—pointing uphill.

Q. Anything else?

A. I think the figures 330 feet on that side, pointing up.

Q. Anything else?

(Testimony of Richard Stafford.)

A. I'm not positive there was anything else.

Q. Any name signed to that?

A. I didn't see the name on it.

Q. Didn't see any. Then, what did you do?

A. I went up along—from there, up to the upper end of that first tier of Three.

Q. What did you find there?

A. There was three or four stakes there.

Q. Wasn't there four stakes?

A. Might have been.

Q. And wasn't they all burned?

A. No, I wouldn't say they were all burned.

Q. And you wouldn't say they weren't either?

A. They were trees—

Q. What?

A. And—it was a tree cut off, I think.

Q. You won't say to this jury that they weren't all burned off? A. No, sir, I wouldn't.

Q. What did you see, if anything there, that had reference to claim No. 3 first tier?

A. "Corner stake, first tier of Three" was marked on the stake.

Q. On which side of the stake?

A. On the side facing uphill, downstream.

Q. Side facing uphill. A. Yes, sir.

Q. And downstream? What do you mean now?

A. The side was blazed uphill, and downstream, on the corner.

Q. Well, which side of that stake was the notice with the writing?

A. I wouldn't be sure if it was facing uphill or

(Testimony of Richard Stafford.)

facing downstream.

Q. All right. Was that an old blaze, or new one?

A. I wouldn't say how old it was.

Q. Any name signed to that?

A. I didn't notice any name on it.

Q. Didn't notice any? A. No, sir.

Q. Where did you go from there?

A. I went up-creek from there.

Q. You didn't follow around those lines any further that day? A. No, sir.

Q. Now, when do you want to say you went there again? A. In July.

Q. In July of 1904? A. Yes, sir.

Q. Well, where did you go to?

A. I came over there from Pedro.

Q. From where? A. To Pedro.

Q. Pedro Creek? A. Yes, sir.

Q. Where did you go from there?

A. I couldn't say where I went.

Q. Where did you live after that, do you remember?

A. I lived at times in town; at times on Fairbanks Creek, and sometimes on Cleary.

Q. When did you go out to that ground again if at all? A. The latter part of September, 1904.

Q. Latter part of September, 1904?

A. Yes, sir.

Q. Now in the meantime you had some conversation with U. G. Hastings and Billy Woodward about this claim, didn't you? A. No, sir.

Q. Didn't.

(Testimony of Richard Stafford.)

A. No, sir. I had conversation with Woodward, but not with Hastings.

Q. Oh. Where was Hastings?

A. Hastings was on Cleary Creek, I believe, at the time.

Q. On Cleary? A. Yes, sir.

Q. Was your conversation all with Woodward?

A. Woodward, and George Roth.

Q. George Roth?

A. Yes, sir, mostly with George Roth.

Q. George Roth is a relative of U. G. Hastings, isn't he? A. I believe he is a connection.

Q. Now, sir, you hadn't seen any names on those stakes up to that time, had you?

A. You mean in September?

Q. Yes, when you was talking with Billy Woodward and George Roth. In September.

A. No, sir, not at that time.

Q. Well, who did you suppose they belonged to?

A. I supposed they belonged to Hastings.

Q. What made you think so?

A. Woodward told me.

Q. You got that information from Woodward?

A. Yes, sir.

Q. Do you remember how it happened that you got to talk with Woodward and Roth about that Bench Claim No. 3?

A. No, I don't know how I got to talking with them.

Q. There was nothing on the stakes that directed you to the fact that they were U. G. Hastings until

(Testimony of Richard Stafford.)

Woodward or somebody else told you?

A. Well, Roth was a broker here at the time and he had a little office here and I went to Roth and was inquiring about these claims.

Q. O, yes—and that's the way you got started to talking about it? A. Yes, sir.

Q. Now, you say in September, 1904, you took an option to buy that first tier of benches off Three?

A. Yes, sir.

Q. Where did that happen—where did those negotiations take place?

A. In—we had the papers made out in Nye's office, I believe—he was in the Horseshoe building.

Q. I asked you where you had the talk and negotiations with George Roth and Billy Woodward about this claim; was it over in George Roth's office across the Creek, or in Nye's office in the Horseshoe building?

A. Why, I had a talk with him before I went to this ground.

Q. Well, your talk must have been in George Roth's office over across the river here?

A. Yes, sir; we had talks in various places.

Q. Yes, sir. Now, where was U. G. Hastings at the time you made the contract for that option?

A. He was on Cleary, I believe.

Q. Was he here at all at the negotiations or the signing of the papers? A. No, sir, I think not.

Q. You say he wasn't here at all?

A. I didn't see him, no, sir; I don't think so.

Q. All of the business was transacted with George

(Testimony of Richard Stafford.)

Roth and Billy Woodward, wasn't it?

A. Yes, sir.

Q. Now, then, you stated here to this jury some of the conversation that took place between you three men. I'll ask you if it isn't true that Billy Woodward told you during those negotiations that he had staked that ground for U. G. Hastings, and that Hastings had never been out there and had never seen the land and never done anything with it at all, didn't he tell you that? A. No, sir.

Q. Didn't George Roth tell you that?

A. No, sir.

Q. Did you understand that from the conversation of either one or both of those men?

A. No, sir, I didn't understand it.

Q. You didn't. A. No, sir.

Q. Did he tell you that he had ever been out there?

A. No, I don't believe he did.

Q. Did you make any inquiry of them whether Billy Woodward had, or Hastings had, or anybody else for them had?

A. I asked them something about it, yes.

Q. What did they say?

A. I believe Roth told me he didn't know as to that, about what Hastings had done on the ground, or what Woodward had.

Q. Yes; and what did Billy Woodward say?

A. Well, I don't recollect what he said.

Q. Didn't you testify yesterday that one of them told you that he didn't know much about discovery, and you would have to go out there and make a dis-

(Testimony of Richard Stafford.)

covery of your own?

A. I said Roth and Woodward, when I was talking to them, said that I better go out and investigate the ground and satisfy myself as to discovery.

Q. And make a discovery of your own?

A. Yes, sir.

Q. And you went out there to do that, did you, afterwards? A. I went out there to investigate.

Q. To make a discovery yourself?

A. Yes, sir, to satisfy myself.

Q. Yes. So that, from that conversation, you must have understood they hadn't made any discovery?

The COURT.—He may answer, whether he did understand that from any conversation they had.

A. I understood that Roth hadn't made a discovery.

Mr. PRATT.—Mr. Woodward didn't ever claim to you that he had made a discovery, did he?

A. I think not.

Q. And they didn't either of them claim that Hastings had made a discovery, did they?

A. They told me that they didn't know what Hastings had done on the ground.

Q. So far as Hastings was concerned, then, and a discovery by Hastings you had no information about that?

A. I didn't know what he had done; no, sir.

Q. Yes. Now, what did you do after that—you claim, then, that you bought the ground of them, don't you? A. Yes, sir.

(Testimony of Richard Stafford.)

Q. Paid fifty dollars down on it? A. Yes, sir.

Q. And were to pay two hundred and fifty more?

A. Yes, sir.

Q. Now, then, what did you do next?

A. Well, we come over, we had a deed drawn up—or an option, drawn up at Nye's office at the time.

Q. That was a deed, was it?

Mr. PRATT.—Was that the contract read here yesterday? A. Yes, sir.

Q. That's what you paid fifty dollars on?

A. Yes, sir.

Q. Now, what did you do after that?

Mr. JENNINGS.—You don't mean after he paid the two hundred and fifty dollars.

Mr. PRATT.—No, no. After you paid the fifty dollars, then what did you do?

A. Why, later on that same month I went over to Dome Creek.

Q. Well, what part of Dome Creek?

A. I went down to Three Below, first tier, right limit.

Q. What did you go there for then?

A. I went there to look over the claim, the stakes and the lines—and to do some prospecting.

Q. To make a discovery of gold there—wasn't that what you went there for too? A. If possible.

Q. If possible, yes. Did anybody go with you?

A. I think I was all alone.

Q. Now, sir, when did you go down there again if at all?

A. The next time that—after June and July?

(Testimony of Richard Stafford.)

Q. No, sir, I'm asking you—I'm holding you now to June and July, 1905; did you go down there and pan on any other occasion than the two that you have mentioned? A. I think not; no.

Q. You think not. Where did you do any work of any kind during that time, any other work?

A. Not on that claim, no, sir.

Q. Not on that claim. When did you go there again to do anything, after June and July?

A. Why the next time that I was there that I remember about, would be in December of that same year.

Q. December, 1905? A. Yes, sir.

Q. Now, when you got down there that time, you found Rooney—the plaintiffs Rooney, Johnson and Plashlart's cabin, and these other men—in possession working, didn't you?

A. There was some parties there at the time.

Q. Well, do you know who they were?

A. I know now, yes, sir.

Q. Well, you did find out then?

A. I knew that Rooney had located in there.

Q. You knew that in December? You knew that in December, 1905 and you knew before that he had located that ground, didn't you?

A. I knew it then anyway, and—yes.

Q. When you looked at the stakes in December, 1905, you saw Rooney's stakes there, didn't you?

A. I think I saw his lower center stake, I wouldn't say.

Q. You saw his cabin—you saw their cabin there?

(Testimony of Richard Stafford.)

A. I couldn't say as to that.

Q. You saw their shaft?

A. I don't remember of seeing their shaft at that time.

Q. You saw their dump? A. No, sir.

Q. You didn't. And yet, at that time you were all around over that claim?

A. No, I wasn't over the claim in particular at that time.

Q. You was at all of the corner stakes—you have testified to that, haven't you?

A. No, sir, I think not in December.

Q. Now, at that time, you had done nothing on this ground other than to pan in September, 1904, and pan once or twice in June and July of 1905—you had done nothing had you? A. Personally, no.

Q. You hadn't sent anybody or hired anybody to go there and do anything further, had you?

A. I had let two lays on it.

Q. I'm not talking about that; I'm talking about mining work—not lays—you hadn't sent anyone or hired anybody to do any work on that claim, had you? A. No, sir.

Q. No, sir. Why did you go down there to pan in June and July, 1905 if you considered you had made a discovery in September, 1904?

A. I don't know why I did, unless to see what extent.

Q. Do you know why you did?

A. It would be—

Q. Now, sir, isn't it true that you didn't think

(Testimony of Richard Stafford.)

yourself that you had made a discovery in 1904, and in June and July, 1905, you went down there and tried it again?

A. No, sir; it is true there was quite a talk about discovery at that time, and as to what extent you had to find for a discovery.

Q. Yes. Now, you have testified this morning, as I remember it that those few colors you found there in September, 1904, were of the value of a half a cent—did you say that—to a cent?

A. Possibly a cent or two.

Q. A cent or two? A. Yes, sir.

Q. As between the colors now, and the color that you picked off of this piece of quartz, which do you suppose was the most value?

A. Why, I would think perhaps what was on the rock would be the most value, as the value goes.

Q. That was just a little speck, sticking in the rock, wasn't it? A. That's all, yes.

Q. You couldn't estimate much about the value of that, could you? A. No, you couldn't.

Q. So when you talk about it being from one to two cents, that's pretty much of a *gues*, ain't it?

A. Yes.

Q. The chances are it wasn't worth anything like that, ain't it— ain't they?

A. It was possible it wasn't that much.

Q. Isn't it true that three or four colors such as the few colors you have testified and described there, you couldn't measure it in cents at all—it would be such a small per cent of a cent that you

(Testimony of Richard Stafford.)

couldn't hardly measure it—isn't that true?

A. Why, judging from my idea of it, it would be from a cent or two in value.

Q. A cent or two? A. In value, yes.

Q. Notwithstanding you couldn't estimate this speck you saw in the quartz at all? A. Yes, sir.

Q. Now, sir, you say that from the finding of those quantities of gold in that muck in September, 1904, and in June and July of 1905, you had made such a discovery of gold that you were justified in doing further development work with the expe*c*ation of developing a mine, don't you? A. Yes, sir.

Q. You have testified to that? A. I say that.

Q. Well, sir, did you stake that ground after finding that gold? Did you put up stakes with your own name on them?

A. No, sir; I didn't locate the claim.

Mr. PRATT.—No, sir; you didn't put up any stakes and write your own name, Richard Stafford, on it?

A. No, sir.

Q. You never filed any location notice, did you?

A. No, sir.

Q. You didn't do any work on that ground, mining work of any kind, did you? A. Personally, no.

Q. You never have, have you? A. No, sir.

Q. You never went down there and went into possession and lived upon that ground for a moment, have you?

Mr. McGINN.—We admit it, but that's calling for a conclusion of the witness.

(Testimony of U. G. Hastings.)

The COURT.—It isn't material, but he may answer.

A. I never lived there, no, sir.

[Testimony of U. G. Hastings, for Defendants.]

U. G. HASTINGS, witness called on behalf of the defendants, being first duly sworn according to law, testified as follows on

Direct Examination.

By Mr. McGINN.—What is your name?

A. U. G. Hastings.

Q. Where do you reside, Mr. Hastings?

A. Chatanika.

Q. How long have you resided there?

A. Two years.

Q. What is your occupation?

A. Mining and prospecting.

Q. How long have you followed mining and prospecting? A. Twelve years.

Q. In what countries?

A. In—principally in around this country; a little in Dawson and Atlin.

Q. How long have you resided in the Fairbanks Recording District, Mr. Hastings?

A. Seven years.

Q. Are you acquainted with W. F. Woodward?

A. Yes, sir.

Q. How long have you known him?

A. Since 1903.

Q. Do you know George Roth? A. Yes, sir.

Q. How long have you known him?

A. Since about 1886.

(Testimony of U. G. Hastings.)

Q. He is a brother in law of yours?

A. No, he is a brother in law of my brother in law's.

Q. The attorney? A. Yes, sir.

Q. He was—Mr. Roth was your attorney in fact here in 1904, 1905, and 1906, was he? A. Yes.

Q. Now, are you acquainted with that certain piece of mining ground known as No. 3 Below Discovery, first tier, right limit, on Dome Creek?

A. Not much.

Q. Do you know whether or not No. 3, first tier, right limit on Dome Creek was ever staked for you?

A. Yes.

Q. By whom was it staked, if you know.

A. W. F. Woodward.

Q. What relation existed between you and W. F. Woodward at that time?

A. Grubstake agreement.

Q. Was there anybody interested in that besides you and Woodward? A. Mr. Roth, George Roth.

Q. When did you enter into this grubstake agreement?

A. Well, Mr. Roth entered into the agreement; he and I were partners and he entered into the agreement while I was outside in, along in March, 1903, sometime.

Q. When did you—when did you return, Mr. Hastings? A. In 1904.

Q. What part of the year?

A. The first of the year, or the first boat, along in June some time.

(Testimony of U. G. Hastings.)

Q. Now, you say you know this claim was staked for you; how do you know that? A. They told me.

Q. Did you know it outside of that?

A. They—I didn't know it was staked until I—until it was bargained for sale.

Q. Well, did you ever see any of the stakes of the claim? A. Not before it was sold.

Q. Well, when did you see the stakes?

A. In 1904.

Q. What time in 1904?

A. No, it was in 1905, the first of October some time—the fore part of October.

Q. Fore part of October, 1905? A. Yes, sir.

Q. What stakes did you see at that time, Mr. Hastings?

A. I didn't pay much attention to what stakes it was; I passed down the creek from the upper end of 10 below and passed one of the stakes and didn't pay any attention to it to amount to anything, being that it had been transferred.

Q. Mr. Woodward and Mr. Roth were either interested with you in this claim, were they?

A. Supposed to be.

Q. And they carried on the negotiations with Mr. Stafford? A. Yes.

Q. You received part of the purchase price, did you? A. Yes.

Q. And approved of their actions all the way through? A. Yes, sir.

Q. Do you know who recorded the notice of location?

(Testimony of U. G. Hastings.)

A. I do not know now, whether it was Mr. Roth or Mr. Woodward.

Q. Mr. Woodward had authority to locate claims in your name? A. Yes, sir.

Q. Now, what stake did you see—do you remember? A. How is that?

Q. Do you remember what stake you saw out there?

A. No, I couldn't; I don't remember which stake it was.

Q. Was your name on it?

A. There was one stake I took to be the corner stake with my name on it.

Q. You think that was about the first of October, 1905?

A. It was some time in the fore part of October, 1905.

Q. Well, you have followed prospecting quite a number of years, have you, Mr. Hastings?

A. Yes, sir.

Q. You're well acquainted with Dome Creek at this time, and was acquainted with it in 1904, weren't you? A. Not very much.

Q. Well, you had been over it, had you not?

A. The first time I went was in 1905.

Q. 1905? A. Yes, sir.

Q. You had owned some property on Cleary Creek, had you not, Mr. Hastings? A. Yes, sir.

Q. Had you done some prospecting on Cleary Creek? A. Yes, sir.

Q. Now, I'll ask you this question: Whether or

(Testimony of U. G. Hastings.)

not, in your opinion, a miner going upon the property in controversy—that is No. 3 Bench, first tier, right limit on Dome Creek—in September of 1904, and there panning upon the draw that runs across the lower end of this claim which you have seen—have you not, you have seen the draw there?

A. Yes, sir.

Q. Yes, sir—panning in that draw and finding gold, particles of gold, colors or gold that in his opinion at that time went from one to two cents; this same person having prior to that time gone along the creek and from excavations that had been made panned the material coming from those excavations and found gold in small quantities, whether or not, taking into consideration the location of Dome Creek, the location of it with reference to the location of Cleary Creek and the location of this particular claim on Dome Creek and the finding of these colors of gold, would have justified the further spending of time in money upon this property where such colors of gold were found in the reasonable expectation of developing a paying mine?

A. He would.

Cross-examination.

By Mr. PRATT.—Mr. Hastings, what time in 1903 did you go outside? A. How?

Q. What time in 1903 did you leave this country and go outside?

A. I left about the middle of September.

Q. Had you ever seen Mr. Woodward up to that time? A. Yes, sir.

(Testimony of U. G. Hastings.)

Q. Did you know him?

A. I met him when I was leaving.

Q. Did you have any contract with him, grub-stake contract with him, before you left?

A. Not at that time.

Q. You left him here and your uncle George Roth, didn't you? A. Yes, sir.

Q. How long did you remain away, Mr. Hastings?

A. Well, from September until June.

Q. Till June of 1904? A. Yes.

Q. Now, this man Woodward was a prospector, and Stafford was in that line of business, wasn't he?

A. Yes, sir.

Q. When you come back Mr. Woodward and Mr. Roth had a little office over here at the end of the bridge, little Broker's office, over at the end of the Bridge, didn't they?

A. Not when I came back; they established that afterwards.

Q. After you got back? A. Yes, sir.

Q. They told you about staking this Three Bench, didn't they? A. I think so.

Q. You think so? A. Yes, sir.

Q. According to your recollection, isn't that the first you ever heard of it?

A. Well, they might have said something to me, I don't remember.

Q. Well, how—what is your recollection now as to how you found out about it at all?

A. Well, it was when they sent a paper of transfer out to me to Cleary to sign.

(Testimony of U. G. Hastings.)

Q. Oh. That was in September of 1904?

A. No.

Q. The first contract—the 2d day of September. 1904?

A. That's the—sometime along there, I don't know when the contract was.

Q. When that got out to Cleary, that's the first you ever heard you had a claim on the first tier of benchess off Three on Dome, wasn't it?

A. Well, I really couldn't say; they might have told me before and it slipped my mind.

Q. Yes, but you don't remember to have ever heard it before you got that contract in September, 1904, do you?

A. No, I don't remember whether they did or not.

Q. Well, the contract—why, you must mean the deed, don't you—the deed to Stafford? A. How?

Q. You must mean that deed to Stafford?

A. That was the option.

Q. The option. Didn't you leave a power of attorney with Mr. Roch and didn't he sign that option for you—isn't that signed by him as your attorney in fact? A. I don't know.

Q. Didn't Mr. Roth sign up this option as you call it, of September 2d, 1904, to Stafford?

A. He possibly did, I don't remember.

Q. Well, then, that paper wasn't sent out to you, was it?

A. Well, I don't remember; there was some paper sent out—I don't remember which one.

Q. Now, don't you recall now that it was the deed

(Testimony of U. G. Hastings.)

of September 8th, 1905?

A. It might have been then.

Q. Now, then, that was a paper you signed and acknowledged, didn't you? A. Yes.

Q. Down there at Cleary—did you acknowledge it at Cleary? A. I think so.

Q. Now, sir, that was the first time that you ever heard that you had the first tier of benches off 3 below discovery on Dome, wasn't it?

A. How is that?

Q. (Question repeated.) A. No.

Q. It was not? A. No.

Q. Haven't you testified already that the first hint you ever got was when they sent that paper out for you to sign?

A. Well, it was when they were making the transaction; when they were making the option they asked me for my sanction.

Q. Well, where was that, here in town or out on Cleary? A. Mr. Roth wrote me to Cleary.

Q. O, he wrote you to Cleary? A. Yes, sir.

Q. So, you think you got a letter from Mr. Roth about that time the option was given?

A. Yes, sir, some time, yes; but they had entered into a contract with Mr. Stafford at the time, if it was all right with me.

Q. If it was all right with you? A. Yes, sir.

Q. They had signed it up already? A. Yes, sir.

Q. And they took part of that purchase price too, did they? A. Yes.

Q. How much did they take?

(Testimony of U. G. Hastings.)

A. Took one-third each.

Q. A third each. Now, you never went out to look at the ground at all, did you?

A. No, I never did before the transaction.

Q. You say you were going along there in October, 1905, and you saw a stake? A. Yes.

Q. Now, sir, isn't it true that you were going down below to No. 10 below right limit, that bench that Woodward staked you there? A. Yes, sir.

Q. That's what you was going down to see?

A. Yes, sir.

Q. You were going down there to look after Claim No. 10 below, first tier right limit? A. Yes, sir.

Q. That Billy Woodward staked for you?

A. Yes.

Q. And that claim you did considerable work on afterwards, didn't you?

Q. When did you go down to No. 10 below to look at that? A. How is that?

Q. When did you go down to No. 10 below now the first time and look at that ground?

A. That was in October, 1904.

Q. Are you sure of that date? A. I think so.

Q. Mightn't it have been later in the spring?

A. I don't think so.

Q. You made a number of trips down there looking over that ground in 1906?

A. I did from here, or I did from Cleary?

Q. I say from here, didn't you? A. Yes.

Q. How many times did you see that stake there—that stake you say you saw there, how many times?

(Testimony of U. G. Hastings.)

A. The stake of Three you mean?

Q. Yes?

A. O, I think I don't know at all; the trail ran right by the stake.

Q. Well, how many times would you say you saw it?

A. I might have seen it twenty and I might have seen it thirty times.

Q. You were there, right by there a number of times in the winter of 1905?

A. The stakes were there.

Q. Will you answer? (Question repeated to witness.) A. Yes, sir, passed up and down the creek.

Q. Now, you don't know on which trip you saw it or when you first saw it, do you?

A. It was the first time, when I went down the creek.

Q. The first trip? A. The first trip.

Q. Had you ever been over to this No. 10 before that?

A. The first trip was October tenth, 1904.

Q. Now, you saw a stake there that said something about a corner stake of No. 3 Bench?

A. Just saw a stake with my name on it.

Q. With your name on it? A. Yes, sir.

Q. And you think it was a corner stake?

A. I think it was; I don't know.

Q. Did you stop and examine it carefully?

A. No, I did not.

Q. Just took a casual glance at it and throught it was your name?

(Testimony of U. G. Hastings.)

A. Well, just principally to know where I was, on the creek.

Q. Yes. How many stakes did you see at that point?

A. I don't remember whether there was more than one or not.

Q. Four or five of them wasn't there?

A. I don't remember.

Q. Did you see Rooney's stake there?

A. I don't remember.

Q. Did you see a corner stake there—

A. I don't remember, I only remember one.

Q. —with No. 1 on it?

A. Yes, sir, with my name on it.

Q. U. G. Hastings?

A. Yes, sir, it might have been, I don't know.

Q. Did you on any other trip scrutinize that, look at it particularly there? A. No.

Q. Now, there was just this one casual glance you made in October, 1905, wasn't it?

A. That's all I ever looked at particularly.

Q. And that's all you know about stakes on No. 3 of benches, isn't it? A. Yes, sir.

Q. As far as your're concerned? A. Yes, sir.

Redirect Examination.

By Mr. McGINN.—Where is Mr. Woodward at the present time, Mr. Hastings?

A. I couldn't say; he went outside last fall.

Q. Do you know when he left here?

A. I think he left along the fore part of September some time.

(Testimony of U. G. Hastings.)

Q. Where was he destined to go at that time; where did he intend to go?

A. I think he was going to stop off at Seattle, and he talked of going to Central America.

Q. Do you know whether he made any discovery of gold out on that property? A. I do not.

Q. You don't know of your own knowledge?

A. No, I don't.

Recross-examination.

By Mr. PRATT.—Well, you know you didn't make any discovery of gold on that claim, don't you?

A. Yes, sir.

Q. You never sent anybody out there to make a discovery of gold, did you? A. No, sir.

That's all.

Redirect Examination.

By Mr. McGINN.—Well, didn't Woodward—didn't you send him out there to do that?

A. Well, I was partners with him and he went out out there—

Q. Do you know whether or not he made a discovery? A. I do not.

Q. As a matter of fact, you never paid any attention to it after the argument with Stafford?

A. I did not.

Q. But you say you had Mr. Woodward out for the purpose of making a discovery and staking the claim for you?

A. That's a natural—

Recross-examination.

By Mr. PRATT.—Did you answer that you did

(Testimony of U. G. Hastings.)

have him out for the purpose of making a discovery?

A. I answered it was natural.

Q. Answer the question—did you say you had Mr. Woodward out there for the purpose of making a discovery for you on the first tier of benches off Three?

A. When you have a man as a partner—

Q. Did you send him out there to make a discovery? A. Any man does, when he—

Q. Did you send Mr. Woodward out there to locate No. 3 Bench first tier for you?

A. When he stakes ground for a man he is supposed to stake it right.

Q. Answer that—did you go and tell him to make a discovery on that claim?

A. I didn't tell him directly, "You go out and make a discovery."

Q. Answer the question: Did you tell Billy Woodward to go out there and stake that ground for you or do anything about it—now, sir, you can answer that yes or no?

A. I wouldn't say I did tell him to do it.

Q. Yes.

A. Go right up and tell him to go out there and make a discovery.

Redirect Examination.

Q. You put up the money to enable him to do it?

A. Of course I did.

Recross-examination.

By Mr. PRATT.—And you didn't know anything about it until four or five months after he staked it?

(Testimony of U. G. Hastings.)

A. No.

Q. And didn't put up any money until long afterwards if at all?

A. Mr. George Roth and myself were interested on discovery. I left money for him, or left my power of attorney for him to act for me and he entered into this agreement filed here and I—

Q. Did you put up any grub or money to Billy Woodward until you got back in June of 1905?

A. I left the money with my partner to do it.

Q. Answer that question, can't you? I asked you if you put up any money or provisions to Billy Woodward prior to when you got back in June, 1905?

A. Yes, I did through my partner.

Q. How do you know whether he turned over anything— A. Only his accounting.

Q. —before that time?

A. Only his accounts to me.

Q. Only his accounts—that's all you know about it? A. Yes.

Mr. McGINN.—Now, I would like to know whether you want me to read this lease, or whether we can agree that the lease that was executed by Stafford, de Journel, Chawford and Miller to Weimer & Ness contained the same terms and conditions, excepting as to the amount of the royalties, as the lease theretofore entered into with Tracy Hope?

Mr. PRATT.—You say it did—you read it.

Mr. McGINN.—Well, you have until to-day to read it.

(Testimony of U. G. Hastings.)

Mr. JENNINGS.—We will take Mr. McGinn's word for it.

Mr. McGINN.—I haven't gone over it carefully, but I can't see any difference in it.

The COURT.—If counsel are willing to have the record show they are the same except in the respect mentioned, it will save encumbering the record.

Mr. JENNINGS.—Of course, the names are different.

Mr. SULLIVAN.—There may be some minor differences, I drew the last one I think myself.

The COURT.—Very well.

[Testimony of Henry Cook, for Defendants.]

HENRY COOK, one of defendants, being called on behalf of himself and codefendants, and first duly sworn, testified as follows on

Direct Examination.

(By Mr. McGINN.)

What is your name? A. Henry Cook.

Q. How old are you, Mr. Cook?

A. Forty-two.

Q. How long have you resided in Alaska and Dawson and this northern country? A. Since 1897.

Q. You're one of the defendants in this action?

A. Yes, sir.

Q. And was one of the plaintiffs in the case entitled Henry Cook against Klonas and others in this court?

A. Yes, sir.

Q. And the same Henry Cook that is mentioned in this notice of location of the Dome Group Association? A. Yes, sir.

(Testimony of Henry Cook.)

Q. What has been your business Mr. Cook since you have been in this northern country, the Yukon and Alaska? A. Miner.

Q. How long have you followed mining?

A. Since 1897.

Q. Since 1897; when did you first become acquainted with Dome Creek?

A. The fall of 1904.

Q. When did you become acquainted with J. C. Ridenour?

A. The fall of—or the summer of 1904.

Q. How did you become acquainted with him at that time?

A. Well, I first mey him on Goldstream, in the summer.

Q. What were you doing at that time?

A. Well, I was working for the Telephone Company at the time.

Q. Did you get to know him at that time?

A. Yes.

Q. Did you know him by name?

A. I knew him by name.

Q. Did he know you by name at that time?

A. Yes.

Q. How long did you work for the Telephone Company? A. O, about two weeks, I guess.

Q. Did you work with him or in a different department?

A. Well, he was drawing poles and we were working for the company, all mixed up together.

Q. Now, when did you first go upon Dome Creek?

(Testimony of Henry Cook.)

A. I went there in December, 1904.

Q. Where did you live at that time Mr. Cook?

A. When I went to Dome Creed?

Q. Yes, sir.

A. Well, I went from Kokomo Creek to Dome Creek.

Q. What had you been doing there?

A. I had been sinking some holes there.

Q. And you went to Dome Creek in December, 1904? A. Yes, sir.

Q. Where did you go to on Dome Creek that time?

A. I went to Three Above, Creek.

Q. Where did you live while you were on Dome Creek that time?

A. Well, for a couple of months we lived in a tent on No. 3 Above.

Q. You say "we," who do you mean by that?

A. Well, a man by the name of Dave Falls and me.

Q. When did you first become acquainted with J. C. Ridenour? A. In March, the spring of 1905.

Q. The spring of 1905; where was he at that time, where was he living?

A. Well, he was living on Goldstream then.

Q. Now, Mr. Cook, I wish you would go on and tell the jury about your staking of the Dome Group in connection with Ridenour, your interview with Captain Barnette, and all about it.

A. Well, I came in and saw Barnette—

Q. Well, now first, I mean before you saw Captain Barnette had you talked to anybody else about locating an association on Dome Creek? A. Yes.

(Testimony of Henry Cook.)

Q. Who had you spoken to?

A. Well, I went over to Cleary and I saw Walter King.

A. I went to Walter King, he was working on No. 6 Above on Cleary at the time.

Q. Now, what Walter King is that?

A. Well, he has been working a lay for us on No. 5 Below on Dome since that time, King & Manson.

Q. (By Mr. McGINN.) He is associated with Mark Manson? A. Yes, sir.

Q. And he is in the city of Fairbanks to-day, isn't he? A. He is—or at least I saw him yesterday.

Q. Well, you spoke to him? A. Yes, sir.

Q. Well, what did you speak to him about first?

A. Well, I spoke to him about grubstaking me, I told him I thought there was pay on Dome.

Q. Well, what was the result of it?

A. Well, he didn't feel as though he was able to go on through with it.

Q. Then who did you go to about it?

A. Well, I came in town here and I was talking to Tozier—

Q. Leroy Tozier? A. Yes, sir, the attorney.

Q. The attorney?

A. Yes, sir; if he knew anybody that I could get a grubstake from and he suggested that I go to Barnette.

Q. Then you went to Captain Barnette?

A. Yes, sir.

Q. Well, go on and tell the jury.

A. I went and told Barnette that I thought there

(Testimony of Henry Cook.)

was a chance for a paystreak on the ground—

Q. This particular ground?

A. There was no particular ground mentioned at all, and he said that he could put up the grub and furnish us a boiler and grub to prospect with, which he done.

Q. What was said as to who would be located in the claim, if anything, Mr. Cook?

A. Well, me and Ridenour was to be located in the claim.

Q. What interest, if any, were you and Ridenour to have?

A. We were to have our interest in the ground.

Q. Well, what interest?

A. Well, the same as we have now.

Q. I say they were—as locators what interest were you to have?

A. We were to have an eighth interest.

Q. You were to have an eighth interest in the ground as locators? A. Yes, sir.

Q. Just go on and state what was said.

A. We were to have an eighth interest in the ground.

Q. Well, now, who was the ground to be staked for?

A. Why, for me and Ridenour and these other people.

Q. In your conversation with Barnette, now just tell the jury what the conversation was, what occurred there?

A. Well, the conversation was we were to have a grubstake and we were to get our interest in the

(Testimony of Henry Cook.)

ground, and then after we thought there ought to be more work to be done on the ground he gave us a one-twelfth interest more.

Q. Mr. Cook, when your deposition was taken in this case you testified there was an understanding or agreement that Captain Barnette was to have a third interest in this association, what have you to say as to that?

A. Well, that's a mistake; he never was to receive a third of our interest, nothing from us.

Q. Did you know what interest at the time Ridenour staked this Dome Group that Barnette was to receive in the property?

A. No, we didn't know what interest he was to get at all.

Q. Did you know who you was to stake the ground for? A. No, we didn't.

Q. Did you know about McGinn & Sullivan having any interest in this property? A. No.

Q. Who was to be interested outside of that?

A. Nobody that I know of.

Q. Did you know anything about McGinn & Sullivan at that time? A. No.

Q. Do you remember of ever having seen any of us prior to the time the claim was located?

A. No, no.

Q. Do you know what time Mr. McGinn arrived in Fairbanks?

A. No, I don't know nothing about what time he arrived in Fairbanks.

Q. When was the first dealings you ever had with

(Testimony of Henry Cook.)

McGinn and Sullivan?

A. I think the first I ever had to do anything with McGinn was when I came in to record the claim.

Q. About what date was that?

A. About the middle of April, I think.

Q. The location notice is dated the 17th of April?

A. Yes, sir, that's about the time.

Q. What dealings did you have with McGinn at that time?

A. Just the recording of this claim.

Q. What did McGinn do, if anything?

A. Well, he told me to go and record the claim.

Q. When did you first go upon this property yourself, Mr. Cook? A. On the Dome Group?

Q. Yes, sir.

A. About the 24th of March, I think.

Q. About the 24th?

A. The 22d or 23d or 24th, I wouldn't be just sure.

Q. Who went with you at that time?

A. Ridenour.

Q. Where did you meet Ridenour?

A. Well, I met Ridenour on Goldstream.

Q. You and Ridenour had been in town before that time? A. Yes.

Q. You and Ridenour had an interview with Captain Barnette? A. Yes.

Q. State whether or not, Mr. Ridenour left town before you did.

A. Yes, he went back to Goldstream I think a day or two before I did.

Q. Did you have any interview with Captain Bar-

(Testimony of Henry Cook.)

nette yourself that Captain Barnette wasn't present at? A. Yes, after Ridenour left he—

Mr. PRATT.—What date is this—this was on the 19th of March, was it?

Mr. McGINN.—No, he says it was a few days before—about what was the date?

A. Well, I wouldn't tell just what date it was, that's quite a long time ago; we got out there about the 22d or 23d of March me and Ridenour on the ground, and we had been in town here—I had been in town here several days before that.

Q. How long had you and Ridenour been in town?

A. Well, he was in town here I think a couple of days.

Q. Couple of days? Now, you say Captain Barnette agreed to furnish a boiler and provisions.

A. Yes.

Q. What, if any, interest was Barnette to receive for that as far as you know?

A. Well, I don't know what interest he was to receive; he wasn't to receive any of our interest. What interest he got of these other people I don't know.

Q. Was that matter discussed between you at all?

A. No, that was none of my business.

Q. When did you first know that Mr. Barnette was to have an interest in the Dome Group?

A. Well, I afterwards learned that Barnette was to have an interest in the ground, that he was expecting at that time to get a half interest.

Q. From whom?

A. From these other people.

(Testimony of Henry Cook.)

Q. Did you know anything about the actual agreement between them?

A. No, I heard—no, nothing.

Q. Mr. Cook, you went out there with Mr. Ridenour and you staked some property on Dome Creek, didn't you? A. Yes.

Q. Now, what happened to you about that time?

A. Well, we were pulling the grub and stuff over from Goldstream and as I was coming back down Fox I slipped and hurt myself.

Q. I don't think the jury—just take your hand down Mr. Cook—

A. —and I went home and stayed that night and I felt so bad I come to town the next day.

Q. Fell down, did you? A. Yes, sir.

Q. Slid on the ice? A. Yes, sir.

Q. And hurt what part? A. I hurt my side.

Q. And then what did you do?

A. I stayed over there that night and came to town the next day.

Q. Did you send anybody out there to take your place? A. Yes, sir.

Q. Who? A. Morrison.

Q. What's his first name? A. Peter Morrison.

Q. What arrangements were made with him—you made the arrangements?

A. All the arrangements that were made I made with him.

Q. Who paid him?

A. Well, I don't know as he ever was paid.

Q. You had just known him and—

(Testimony of Henry Cook.)

A. Yes, for years.

Q. When you got out there now what had been done Mr. Cook?

A. Well, the ground had been staked and they had started a hole.

Q. How deep was the hole at that time?

A. Well, probably thirty or forty feet, I couldn't tell.

Q. Thirty or forty feet?

A. Something near that.

Q. Were the lines all blazed out at that time?

A. No, the lines wasn't blazed out; the ground was staked but the lines wasn't cut out.

Q. When were the lines cut out?

A. They were cut out some time the last of May.

Q. Who cut them out? A. Me and Ridenour.

Q. How wide were the lines that you cut out there?

A. O, probably six, eight or ten feet, I couldn't say exactly.

Q. After you cut out the lines, I'll ask you to state to the jury whether or not the boundaries of that claim could be readily traced?

A. Yes, they could be followed all right.

Q. Now, I believe you stated that hole was about thirty-five feet deep when?

A. Something like that when I got out there, yes, sir.

Q. And you and Ridenour continued to sink to bedrock? A. Yes, sir.

Q. And when did you make a discovery in that

(Testimony of Henry Cook.)

shaft? A. Something about the middle of April.

Q. What did you find?

A. Well, we found some colors of gold.

Q. Now, I'll ask you to state whether or not in your opinion as a miner and prospector the colors of gold that you found there at that time were sufficient to justify an ordinarily prudent man in the further development of that ground with the reasonable expectation of making a paying mine?

A. Well, it would help him out some, yes; a man is justified in sinking a hole in any place in this country on a creek. This is a gold-bearing country and a man is justified without finding colors any at all, in sinking a hole.

Q. Well, the finding of colors wouldn't hurt him?

A. Why no, it might help some. This is a gold-bearing country.

Q. Do you remember about what date that was, Mr. Cook, that you made that discovery?

A. That was about the middle of April, something near there.

Q. About the middle of April?

A. Something near there, yes.

Q. Well, after you made the discovery what did you do?

A. Well, I came into town here and I think recorded the ground.

Q. What else was done at the time Mr. Cook; had anybody else entered on that Group?

A. Yes, I think Klonos had entered the ground and I forbid him and then I came in here and spoke

(Testimony of Henry Cook.)

to Barnette about it and there was action fetched then.

Q. That's when you saw me, was it?

A. Yes, sir.

Q. That action was brought about the 20th of April 1905? A. Something about there.

Q. Against John Klonos then, personally?

A. Yes, sir.

Q. Do you know what if any arrangements Captain Barnette had with McGinn & Sullivan at that time? A. Not at all, no, sir.

Q. You weren't concerned with that? A. No.

Q. When did that hole get to bedrock?

A. That hole got to bedrock about—O, some time in May, I don't know.

Q. Some time in May?

A. I can't tell to just the date.

Q. Well, what did you find when you got on to bedrock there? A. We found colors.

Q. Colors. How was the bedrock pitching?

A. The bedrock was pitching into the hill.

Q. You found wash gravel? A. Yes.

Q. What did you do then?

A. I drifted a little in the hole.

Q. About how many feet?

A. O, possibly twenty-five feet.

Q. Now, what was your agreement originally with Captain Barnette when you had your understanding here, that is as to work?

A. We were to put this hole on down to bedrock, and then we decided there ought to be work done and

(Testimony of Henry Cook.)

he gave us another twelfth interest in the ground to put down two more holes.

Q. Well, what did you do in the way of carrying out that agreement?

A. Well, we finished the agreement all right.

Q. Well, what did you do?

A. We went down to Four Below, First Tier and put down a hole down there.

Q. When did you get down there Mr. Cook?

A. We went down there somewheres about the 8th or 10th of June.

Q. Where was your tent?

A. On Three below, first tier.

Q. Did you see the boundaries of Three below, first tier, at that time? A. Yes.

Q. Tell the jury whether the boundaries of that claim were well marked.

A. Yes, they were marked.

Q. And you can tell this jury positively that the tent was on No. 3 below first tier right limit?

A. Positively on Three, the lower end of Three.

Q. Now, you put that hole to bedrock? A. Yes.

Q. What was the depth?

A. I think that hole was about a hundred and thirty feet, thirty or thirty-five feet.

Q. What would be the cost of those holes including the labor and everything else put on it?

A. O, it would cost a thousand dollars to put one of those holes down that deep.

Mr. PRATT.—You mean each one?

A. Each one, yes.

(Testimony of Henry Cook.)

Mr. McGINN.—When did you get to bedrock in that hole?

A. Somewheres about the first of August, I think.

Q. What, if anything, did you find at the bottom of that shaft? A. There was small pay there.

Q. What would it average?

A. O, possibly three or four cents.

Q. You regarded that as pay at the time, did you?

A. Well, small pay, yes.

Q. Well, when you got that hole down what did you do, Mr. Cook?

A. We drifted in the hole a little.

Q. Now, Mr. Cook, during the time that you were sinking this shaft, where were you living?

A. Living in this tent on Three.

Q. Now, after you got this tent put to bedrock and about the 12th of October where did you live—or this shaft to bedrock?

A. Well, in the last of October or the first of November we built a cabin on Four there.

Q. On Four? A. Yes.

Q. That is above there—on that part there (indicating on map).

A. Yes, and we lived in that the balance of that winter.

Q. Well, what other work did you do that winter Mr. Cook?

A. We went down on Five and put a hole to bedrock there.

Q. And after getting to bedrock there what did you do? A. We drifted in that hole too.

(Testimony of Henry Cook.)

Q. Yes; now were you on the claim about the 21st day of September, 1905? A. Yes.

Q. Where—do you know William Rooney?

A. Yes.

Q. When did you first see him?

A. I saw Rooney I think the night he staked the claim, this No. 3.

Q. Where did you see him?

A. I saw him in a cabin—it is a stable now of George Friend of Friend & Lawson; Pounder & Graham, that was their cabin at the time they had been stopping there and drifting there that summer and I was in there, and there was two more men, a man by the name of Kavanaugh and a man by the name of Powell; and Rooney and Johnson and Plaschlart came in there, I don't know if they knew me and in fact I don't think they did, and I didn't know them at the time, but they were talking about this claim—

Q. What did they say?

A. Well, that there had been nothing done on it and according to Wickersham's decision there had to be a hole down on each and every claim.

Q. A hole to where?

A. To bedrock, and that they were going to take a chance.

Q. You think that was the night of the day they staked the claim?

A. Yes, pretty sure; but I think it was a little later than the twenty-first.

Q. Did they assign any other reason at that time, Mr. Cook? A. No, not that I know of.

(Testimony of Henry Cook.)

Q. You got your deed, did you, Mr. Cook, for this one-twelfth interest you spoke about? A. Yes.

Cross-examination.

(By Mr. PRATT.)

Mr. Cook, I believe you said you was forty-one years of age? A. I am.

Q. What county or state are you native of?

A. I was born in Ireland.

Q. In Ireland? A. Yes.

Q. You have lived in the States?

A. Yes, I lived in the States some.

Q. And Canada?

A. Yes, and I have lived in Canada.

Q. When did you say you came into the Fairbanks District to live? A. The spring of 1904.

Q. The spring; and you got acquainted with Ridenour that summer? A. Yes.

Q. And in the forepart of 1905 you began thinking of locating an association claim along there did you? A. Yes.

Q. This particular ground?

A. O, not this particular ground, no.

Q. Just some ground?

A. Just some ground, I did, yes.

Q. And you talked to Ridenour about it?

A. Yes.

Q. He and you concluded finally you would come to town and see Captain Barnette?

A. Well, I told Ridenour I had talked with Barnette, yes.

Q. You had talked with Barnette before that?

(Testimony of Henry Cook.)

A. Yes.

Q. That happened by reason of Mr. Tozier telling you to go over there, did it?

A. Yes, I wanted a grubstake.

Q. You didn't enter into any definite negotiations with Barnette at that time, did you?

A. No, not until I had seen Ridenour, no.

Q. Now, after you talked to Tozier you go out to the creek and see Ridenour about it and he and you come in? A. Yes.

Q. How long intervened between that and the Tozier affair? A. That was only a few days.

Q. When you came in you and Henry Cook went to Captain Barnette's office, didn't you?

A. Me and Ridenour went there, yes.

Q. And you opened up the subject of getting money, to get him to advance the necessary funds to enable you and Ridenour to locate an association placer claim out there, didn't you? A. Yes, sir.

Q. Did you discuss the ground you expected to locate?

A. Well, we discussed different parts of the creek, yes; not this particular ground.

Q. No. You asked Captain Barnette to advance the provisions and tools and all the money that was necessary to enable you and Ridenour to go out there and stake an association claim and at least sink one hole to bedrock, didn't you? A. Yes.

Q. Well, that involved an expenditure of a thousand or fifteen hundred dollars on his part, didn't it?

A. Yes.

(Testimony of Henry Cook.)

Q. What? A. Yes.

Q. And now, you say that in all the conversation and understanding that you and Ridenour—well, you said once, at least that was my understanding, that the understanding was that you and Ridenour were to have the same interest in that location that you have now—is that right? A. No, I didn't.

Q. Didn't you say that at one time on direct examination?

A. We were to have an eighth interest in the group.

Q. You now have a sixth, haven't you?

A. Yes.

Q. What was the understanding as to names that were to go in that location, the other eight?

A. I didn't know anything about the names.

Q. Didn't you ask Captain Barnette what names he was going to furnish? A. No, I did not.

Q. Didn't you think or understand he was to be one of the locators? A. I didn't know.

Q. Didn't he tell you he had powers of attorney from a lot of people and give you some of those names? A. Yes.

Q. So you took it he was going to give you the names of some of these people with reference to whom he held powers of attorney, didn't you?

A. Yes.

Q. Six of them, yes, sir. Now, I understood you to say, before you got away from his office you and Ridenour, both of you, understood that when that claim was located and these six names were used,

(Testimony of Henry Cook.)

that Barnette was to have half of the interest of those six persons?

A. Well, I understood that, yes; I didn't know.

Q. That would be three-eighths, wouldn't it, that he was to have?

A. Well, I didn't know; I don't know what interest he was to have.

Q. Well, six-eighths divided by two would be three-eighths?

A. He expected a half interest he said; where he got it I don't know.

Q. Expected to get, yes; well, you expected he was to get at least three-eighths, half of the six-eighths? A. Well, he said he expected it.

Q. Well, you believed he was going to get it?

A. Yes, sir, but I didn't know.

Q. Ridenour was right there and heard all of this conversation?

A. I don't know; Ridenour was never at Barnette's but once.

Q. Now, this understanding come to be made by what Captain Barnette told you when you were both sitting there and talking to him making the arrangements?

A. Well, I don't know whether it was or not.

Q. You don't know; well, didn't you talk over that subject in the presence of Mr. Ridenour?

A. What subject was that?

Q. That Captain Barnette was to have half of the interest of these persons for whom he held powers of attorney?

(Testimony of Henry Cook.)

A. I don't know whether we did or no.

Q. Don't know whether you did or not? A. No.

Q. You want to tell this jury that when you and Captain Barnette were talking when you got that understanding, Ridenour wasn't sitting right there and listening?

A. Ridenour never seen Barnette but the once.

Q. I know it, but that was when you and he came in to negotiate about this matter, wasn't it?

A. Yes, sir.

Q. And that was the time you understood Barnette was going to get a half?

A. Well, Barnette said he expected to get half or something out of these people.

Q. Wasn't he, when he said that wasn't Ridenour sitting right there and listening?

A. Yes, he was there listening once.

Q. He was there listening to that talk? A. Yes.

Q. And you know that ever since then all the royalties from the Dome Creek Association have been divided one-third to Barnette, one-third to you and Ridenour and one-third to McGinn & Sullivan, don't you? A. Yes.

Q. Now, after you got this arrangement and this understanding that you have been talking about you and Mr. Ridenour go out there to stake that claim and put down a hole, don't you?

A. Yes, we put a hole down, yes.

Mr. PRATT.—And you went down there right after that conversation? A. Yes, sir.

Q. How soon after?

(Testimony of Henry Cook.)

A. We went right out there, we were out there the 22d or 3d of March, yes, we went right out.

Q. And then, you got hurt and came to town?

A. Yes, sir, I wasn't there for maybe a week.

Q. You wasn't there when the notice was posted the 22d or 23d? A. No, sir.

Q. You saw that after you got out there?

A. Yes, sir.

Q. This printed notice? A. Yes, sir.

Q. Six names on it? A. Yes, sir.

Q. That's the first time you ever knew the names of these six persons, isn't it? A. Yes.

Q. Yes. So you and Ridenour go to sinking Shaft No. 1, don't you? A. Yes.

Q. And you got to bedrock in May, don't you?

A. Yes.

Q. And you virtually find nothing there, don't you? A. Well, just found colors.

Q. Just colors. Now, I call your attention to this map—

Mr. McGINN.—Plaintiffs' Exhibit No. 4.

Mr. PRATT.—To Plaintiffs' Exhibit No. 4; I want you to point out on that exhibit there Shaft No. 1 that you and Ridenour put down first.

A. That shaft is somewhere there (pointing to Exhibit 4).

Q. Somethere there. Ain't that marked there Shaft No. 1, or is it? A. Yes, that's shaft No. 1.

Q. Yes, Shaft No. 1; that's it right there, ain't it?

A. Yes.

Q. Now, sir, when you got that down you and

(Testimony of Henry Cook.)

Ridenour concluded that that paystreak was higher up the hill, didn't you?

A. Yes, I didn't know where it was; we didn't know where it was and we didn't conclude nothing —we didn't know where the pay was at the time.

Q. Yes; that was in May, 1905, wasn't it?

A. Yes.

Q. So you move higher up the hill and go down on the upper end of Four below bench?

A. Well, that wasn't any higher up the hill I don't think.

Q. You don't. Anyhow—

A. You mean further down the creek?

Q. Well, then, you sunk a shaft on No. 2—or No. 4? A. Yes, sir.

Q. That's higher up the hill than Shaft No. 1?

A. I don't think it is as far from the creek.

Q. Well, take a look at it.

Mr. McGINN.—We object, the plat shows for itself.

Mr. PRATT.—Yes, it shows it's further, don't it?

A. No, sir.

Q. Let me call your attention—this is the creek?

A. Yes, sir.

Q. There is Shaft No. 1?

A. Yes, sir, and here is the creek and Shaft No. 2.

Mr. McGINN.—He is asking if it was further away.

Mr. PRATT.—Yes, it's higher up the hill, ain't it?

A. Very little.

Q. Very little. All right; let it go at that. Now,

(Testimony of Henry Cook.)

when you got down there you drifted a little—which way did you drift? A. I drifted both ways.

Q. Up and down the valley, laterally, or across the valley? A. Across the valley.

Q. Which way from the shaft, uphill or downhill?

A. Across the hill, up and down.

Q. How far did you drift on either side?

A. About fifty feet, I guess.

Q. How much on the upper side?

A. Probably fifty feet.

Q. How much on the lower? A. Twenty-five.

Q. Twenty-five feet on the lower side and how much uphill? A. Fifty feet, the hill is—

Q. You didn't find much on the lower side, did you? A. I found small pay.

Q. At that time Pounder & Graham had struck pay on the second tier of benches?

A. Yes, they struck pay.

Q. And you and Ridenour concluded you were too far down the hill?

A. I don't know whether we did or not.

Q. At that time wasn't it your opinion and Ridenour's also that that pay-streak didn't run across the first tier of benches at all?

A. No, it wasn't—we didn't know.

Q. Didn't know? A. No.

Q. You thought the chances were it run off into the second tier of benches, didn't you?

A. No, we didn't.

Q. Didn't Pounder & Graham's pay-streak indicate that?

(Testimony of Henry Cook.)

A. They had pay on the second tier but we didn't know how far it run up the hill.

Q. But didn't that indicate it passed on into the second tier of benches?

A. No, I didn't know.

Q. Well, you rather thought it did?

A. No, I didn't.

Q. You didn't? A. No.

Q. Well, sir, you built a cabin there in the fall of 1905? A. Yes, sir.

Q. On Four? A. Yes.

Q. And lived there that winter? A. Yes.

Q. Where did you go to work next?

A. We stayed there.

Q. Well, where did you go to work next to drive a hole?

A. We made a hole on Five that winter.

Q. Point out on that map your Shaft Three was on Five.

A. I don't know if it's on there; I don't think it's on there.

Q. Isn't it on there, Mr. McGinn?

Mr. McGINN.—No, I don' think it's on there.

Mr. PRATT.—Well, make a mark there with a pencil about where you think it is; put it down where you say it is.

A. (Witness points Ex. 4.)

Mr. McGINN.—That's close to the shaft sunk by Klonos?

Mr. PRATT.—All right; on Five.

Mr. McGINN.—How far from the lower end of

(Testimony of Henry Cook.)

Five was it, Mr. Cook?

A. O, it was about 200 feet, I guess, at the lower end of the Dome Group Line.

Mr. PRATT.—I want you to put a mark on there about where you think it was.

Mr. McGINN.—Now, let the witness understand the plat; here is the lower end of Five; here is the first tier, the black line is the lower end of the group, and here is the dividing line between the first and second tiers.

Mr. PRATT.—(Referring to map.) This must be the lower line of first bench off Five, isn't it? Yes.

A. (Witness marks.) Well, somewheres here—somewheres in there.

Q. Somewhere right there?

A. Yes, sir, about there—I ain't a surveyor.

Q. Well, that's farther up the hill than No. 2 shaft, isn't it? A. Yes, that is.

Q. Well, when did you start that No. 3 shaft on No. 5?

A. That shaft was started some time in December.

Q. December; when did you get to bedrock?

A. We got to bedrock there some time in March, the spring of 1906.

Q. Now, at that time you and Ridenour knew the pay-streak was on the second tier of benches rather than the first? A. No, we did not.

Q. Ain't it true, Mr. Cook, that nobody out there had an opinion or ever dreamed there was any pay on the first tier of benches until Ness & Wiemer got

(Testimony of Henry Cook.)

down there in March, 1906? A. Yes, they did.

Q. Well, what did they go on?

A. In March of 1905 on the lower end of discovery, first tier, they had pay there near the center of the claim.

Q. Yes?

A. Yes, a man by the name of Jensen & Shoddy had a lay from Thostasen.

Q. And that indicated the pay must run off the first tier of benches off Three?

A. Yes, it would give a pretty good idea.

Q. Now, what's the date of that?

A. March, 1905.

Q. And still you and Ridenour went and moved higher and higher up the hill, didn't you?

A. Yes.

Q. You did? A. Yes.

Q. Mr. Cook, you and Ridenour were outfitted in March of 1905 and commenced sinking that No. 1 shaft, didn't you? A. Yes.

Q. And you got down and found colors about the fifteenth of April, didn't you, in the gravel?

A. Yes, somewhere along there, yes.

Q. And on the 17th you came in here to town and filed the notice of location, didn't you? A. Yes.

Q. You and Ridenour on the 15th of April when you got those colors in that gravel considered you had made a mining location?

A. Well, we come in and recorded the ground.

Q. You men went there to make a discovery for yourselves for that Dome Creek Association, didn't

(Testimony of Henry Cook.)

you? A. Yes.

Q. And as soon as you got into the gravel down there you came to town and put it on record, the notice? A. Yes.

Q. You and Mr. Ridenour understood then and understand now do you not, that you have the right to claim a mining title when you make a discovery of gold for yourselves? A. Yes.

That's all.

Redirect Examination.

By Mr. McGINN.—Mr. Cook, do you know whether Mr. Ridenour was present at the conversation you had with Captain Barnette in which Captain Barnette stated he expected to get a half interest in this property that you were locating?

A. I don't know whether he was there positively or no; I wouldn't be positive about that.

Q. Now, Mr. Cook, where did you get the idea that Captain Barnette was to get a half interest from these people he was locating under power of attorney?

A. I don't know what he was to get, only he said he was to get a half interest from these people.

Q. Do you know whether he said that?

A. Well, I ain't positive.

Q. Do you know whether you had an understanding prior to the time you located this property that Captain Barnette was to get a half interest?

A. No, sir, I do not.

Q. Where did you get that understanding from?

A. Well, the custom is if a man stakes a piece of

(Testimony of Henry Cook.)

ground he always *give* an interest to the man that puts up the grubstake.

Q. Gets a half interest? A. Yes, sir.

Q. Mr. Cook, did you and Ridenour ever enter into any agreement with Captain Barnette whereby you or any of these defendants were to get more than twenty acres? A. None at all.

Q. You were to get your twenty acres in the group and Ridenour was to get twenty acres?

A. Yes, sir.

Q. But what Barnette was to get you didn't know?

A. No, I did not.

Recross-examination.

(By Mr. PRATT.)

Well, you finally got a one-sixth interest?

A. Yes, he gave us that, Mr. Barnette, for putting these other holes down.

Q. Yes. Mr. Cook, haven't you testified to this jury that Captain Barnette said something to the effect that he expected to get a half interest from these people?

A. Well, he said something about a half.

Q. Something about that, yes. And if he hadn't said that you wouldn't have got any impression about it one way or the other, would you? A. No.

Q. What? A. No.

Q. And Ridenour was sitting right there listening?

A. I don't know whether Ridenour was there or not.

Q. Ain't it your best impression that Ridenour

(Testimony of Henry Cook.)

was sitting there listening to that? A. No.

Q. You don't want to say to this jury that he wasn't, do you? A. Well, I don't know.

Q. Well, you and Ridenour were partners, weren't you?

A. Well, we were after that; we wasn't at that time; no.

Q. Hadn't you agreed between yourselves that you were to go to Captain Barnette and try to make this arrangement with him?

A. I seen Barnette before Ridenour did.

Q. Answer me; hadn't you and J. C. Ridenour agreed between yourselves to go to Barnette's office and see if you could get him to enter into the arrangements you did get him to enter?

A. I went and seen Ridenour and talked about it, and he says, "All right; we will go and see him."

Q. And you then both went there personally?

A. Yes, sir.

Q. And you both engaged in conversation with Captain Barnette about the matter?

A. Yes, sir.

That's all.

Redirect Examination.

Mr. McGINN.—When was it you had that understanding—was it before or after the property was located? A. After.

Q. After? A. Yes.

[Recital Re Additional Evidence Introduced.]

There was evidence proving that at the time the plaintiffs staked the ground in controversy, they knew, or could have known, that it had previously been staked by Woodward for Hastings.

The defendants introduced in evidence a written lease from Richard Stafford to Tracy and Percy Hope, of date December 20, 1905, for six hundred and sixty feet for the width of the claim of placer claim number three in dispute, whereby seventy per cent of the gross output was to go to the lessees and thirty per cent to the lessor. This lease was recorded on November 21, 1906, in Volume Two of Leases, at page 128.

Also another lease about the same time between Stafford, de Journel, Crawford and Miller as lessors and Weimer and Ness lessees in substantially the same terms, for a part of the same ground.

There was evidence proving that, at the time of the staking of the Dome Group Association Claim by Cook and Ridenour as aforesaid, and at the time of the discovery of gold by them, and at the time of the contract of McGinn and Sullivan for a one-third interest in the said Dome Group Association Claim, said McGinn and Sullivan did not know that there was any agreement or understanding that the said Barnette should have a one-half or any portion of said claim, or that any of the locators of said claim were to acquire more than twenty acres by that location.

There was evidence proving that the said cause

of Cook vs. Klonos was a suit brought by Henry Cook, J. C. Ridenour, A. T. Armstrong and the other persons named as locators of the Dome Group association claim, against John Klonos and several defendants including Richard Stafford, the same being cause No. 278 filed in the District Court for the District of Alaska Division No. 3 (now Division No. 4), to clear the title of the said Henry Cook and the other plaintiffs therein against the claims of the said defendants; that said suit resulted in a non-suit rendered by Judge Gunnison against said plaintiffs.

There was evidence proving that the claims of Richard Stafford to the ground in dispute had never been litigated except in said suit No. 278.

There was evidence proving that the defendants in this cause brought the Stafford title after Judge Gunnison had decided said cause of Cook vs. Klonos adversely to the plaintiffs in that case, and that they were induced to buy said title by reason of said decision.

Defendants rest.

Plaintiffs rest.

Defendants rest.

Mr. JENNINGS.—I wish to make a motion which I think goes to the very gist of the whole controversy, as follows:

The evidence in this case having been closed, the plaintiffs request the Court to charge the jury as follows:

[Instructions Requested by Plaintiffs, etc.]

1. Under the evidence in this case, it is your duty to find that the plaintiffs are the owners and entitled to the possession of the property in dispute, to wit, Claim No. 3 below discovery, first tier, right limit, Dome Creek, Fairbanks Mining District, and accordingly you will so find in favor of the plaintiffs, together with such damages as you may find they are entitled to under the further instructions of the Court.

2. You are instructed that so far as the title to the property in dispute is concerned, you are not to consider the first affirmative defence of the defendants, to wit, the alleged Dome Group location.

3. You are instructed that so far as the title to the property in dispute is concerned, you should not consider the second affirmative defence of the defendants, to wit, the so-called Stafford claim.

4. You are instructed that so far as the title to the property in dispute is concerned, you should not consider the third affirmative defence of the defendants, to wit, the so-called Ridenour title.

Now that first request is a blanket request, and I meant by that that it was to be virtually an instructed verdict, but if your Honor disallows that, then I want a ruling separately on the Stafford title, the Dome Group title, and the Ridenour title or selection.

The COURT.—Now, I will suggest, Gentlemen, the only matter I care to hear you on is this:

Mr. McGINN.—I desire to make a motion on the record also.

The COURT.—Let's dispose of this matter first: Just read that motion, Mr. Reporter. (Reporter reads first ground of motion above set forth.) The motion is overruled as to the first assignment; read the second. (Reporter reads second ground of motion above set forth.) The motion is overruled as to the second assignment—read the next. (Reporter reads third ground of motion above set forth.)

The COURT.—The motion is overruled as to that assignment. (Reporter reads fourth ground of motion above set forth.) I will hear you on that; and I will hear you on this proposition, on the question of why you insist—I have gone over your instructions—why you insist that if the jury finds that one or two of the locators of the Dome Group participated in any fraud as to that location, why that should vitiate the entire location when it seems to be in direct contravention of the opinion of the Circuit Court of Appeals in the case of Cook et al. vs. Klonos et al. The other matters I am pretty clear on.

Plaintiffs except to the ruling of the Court in overruling the first, second, and third grounds of motion.

Mr. JENNINGS.—Well, your Honor, if I can show your Honor an authority to the effect that a location, when no discovery has been made, is absolutely valueless for any purpose, and that where a corporation transferred some of its fully paid stock in return for such a location the Court held that it was a null and void transfer, that it was a transfer in which they were getting something for nothing and such a location as that is absolutely void; and then if I could show your Honor an authority of the Circuit

Court of Appeals for this circuit that a location without a discovery is nothing and there is nothing to transfer—where the Court speaks of such a transfer of "something which is, in fact, nothing" and an attempted transfer as relinquishing something of the Government's which he never had; and then if I supplement that, if the Court please, by calling your Honor's attention to the dissenting opinion of Judge Beatty in Chrissman vs. Miller, a case where he speaks of such a thing as being absolutely nothing; if I call your Honor's attention to the case of Chrissman v. Miller, where he refers entirely to possession coupled with work and development, and the decision of the California court in the case of Weed vs. Snook, which came after the Chrissman vs. Miller case, in which they particularly call attention to the fact that it is in possession that effects such a transfer; and if I can show your Honor that a person who locates must go and make his own markings of boundaries and he cannot take advantage of the fact that somebody else has marked it and then transfer it because he would be transferring nothing, would that make any difference to your Honor on this Stafford title?

The COURT.—I don't think you can show to me that as a fact under this evidence in this case or the law. I suppose if there should be a verdict against you, I would have to hear it on a motion for a new trial; but the evidence before this Court, I think, on the Stafford title is sufficient to go to the jury. I don't want you to take up the time of the Court on matters I have made up my mind on; but I will hear you on it now.

The COURT.—I think in order to keep the record straight the motion of the defendants should now be made; the jury may retire for five minutes.

Whereupon the jury retired.

[Motion for a Directed Verdict, etc.]

Mr. McGINN.—The defendants in this case, and each and all of them, request the Court to direct a verdict for the defendants in this case, for the reasons:

1. That the evidence in the case, undisputed, shows that at the time of the alleged location of the plaintiffs in this case, the ground in dispute was not unoccupied, unappropriated public domain of the Government of the United States; that, on the contrary, the evidence shows that at said date the property was in the actual possession of J. C. Ridenour and Henry Cook, acting for themselves and for the other six locators of the Dome Group association claim, and at that time they had marked the boundaries of said claim upon the ground so that the boundaries thereof could be readily traced, and had discovered gold in paying quantities, and had recorded their notice of location, which notice of location was notice to all the world as to the claimants of said ground, and that the plaintiffs could not intrude upon their actual possession and seek to initiate any rights, and could not, without any color of title, intrude upon that possession and thereafter seek to initiate a claim in order to assert some flaw in the title of the defendants.

2. The defendants also request the Court to instruct the jury to return a verdict in favor of the defendants and each of them, for the reason that the

priority and validity of the Dome Group location being established and not questioned by anybody, and the only way that the plaintiffs seek to overcome that location is by endeavoring to establish that there was a fraudulent understanding between E. T. Barnette and the six absent locators, to the effect that he was to have one-half of what they were to get out of the location; that that is a matter that cannot be inquired into by the plaintiffs at all in this action—it is a matter that can be inquired into only by the Government; but that even if it could be inquired into by these plaintiffs in this case, the evidence absolutely fails to establish, and there is not sufficient evidence to submit that matter to the jury in this case. And furthermore, as far as the evidence of J. C. Ridenour and Henry Cook is concerned, that shows that there was no agreement or understanding that E. T. Barnette was to have any portion of the claim as to them, nor did they know or have any knowledge of any such understanding or agreement between E. T. Barnette and the six absent locators; and particularly is this true as to J. C. Ridenour, where upon the same evidence the Circuit Court of Appeals has held that there was no evidence to connect J. C. Ridenour with the fraud in any way. That even if the jury in this case should find that the alleged Dome Group location as to some of the locators was fraudulent as to the Government of the United States, but that it did not extend to all of the locators, then from the time of the finding of the fraud by the jury in the case the innocent locators would have the right to select a certain portion of this Dome Group location, and that being

so, the matter cannot be left to the jury in any way.

3. The defendants also request the Court to instruct the jury to return a verdict in favor of the defendants McGinn and Sullivan, because under the evidence in the case, undisputed, McGinn and Sullivan are shown to have been innocent purchasers for value, without any notice or knowledge whatsoever of any fraud on the part of E. T. Barnette and the other persons locators of said claim, or any of them.

4. And the defendants further request the Court to instruct the jury to return a verdict for the defendants because it is shown by the evidence, that at the time of the institution of this suit the defendants were not themselves in the actual possession of the property in dispute.

5. We further move the Court for an instructed verdict, because it is shown by the evidence that J. C. Ridenour, under the decision of the Circuit Court of Appeals in the case of Cook et al. vs. Klonos et al., selected the particular portion of the ground in controversy out of said Dome Group association claim, or such a portion of it only as the defendants seek to recover and ask as to that portion claimed by Ridenour under such selection—request that the Court instruct the jury to return a verdict for J. C. Ridenour under and by virtue of such selection.

Motion denied. Exception.

The COURT.—Under the view I take of the ruling of the Appellate Court, and under the evidence as to the location or selection made by Ridenour, I don't think it is in a form that could have been contemplated by the Appellate Court, and for that reason

that defence will be withdrawn from the jury.

Defendants except.

Mr. JENNINGS.—Now, will the Court indicate whether or not if the evidence will show that all of these persons had knowledge of this fraudulent arrangement, it would render the Dome Group absolutely void?

The COURT.—My views at this time are, Mr. Jennings—I have devoted considerable time to the consideration of an instruction on that point; but the way the evidence stands and the way this case appears before the Court and jury at this time, it seems to me that if no selection has been made by anybody, that after the discovery of the fraud, if the jury should find that there was fraud at all and that a discovery of the fraud was made by the other locators and they didn't in this case ask—or have not in this case asked to have No. 3, to wit, the property in controversy set aside for them, that under those circumstances the instruction must be that they have no right to it.

Mr. McGINN.—Well, J. C. Ridenour now elects to select out of the Dome Group location the particular property in controversy at this time.

The COURT.—The request should be denied, because the jury would have no means of determining whether it was a lawful selection.

Mr. McGINN.—Well, how will your Honor instruct the jury? Haven't we the right of selection at all?

The COURT.—Under my view they have made a selection that is a void selection.

Mr. McGINN.—Well, then, they haven't made any selection at all.

The COURT.—Well, I think it is too late now to make a selection. If any other view was taken of it, they could reserve the right of selection just as long as they desired; so I take it after a man makes a selection under that decision, if my interpretation of it is correct, and I think it is, that they have the right of selection and that their right of selection dates from the birth of the location; yet, if they did select and the selection is void, that ends their right, I think, under that decision, as far as this case is concerned.

Mr. McGINN.—Your Honor holds, then, that we can't locate over any part of that location?

The COURT.—I don't think so in this case, Mr. McGinn, because it seems to me that under the ruling of the Appellate Court that Court must have contemplated that a placer claim something like an ordinary placer claim must be selected, and that a claim would not have been selected merely for the purpose of including all the property in controversy—if not all the property in controversy, then as much as they could cover. While I am not as clear on the matter as I would like to be, that is the solution I have made for myself as to the litigation in this case—as to this peculiar situation.

Mr. JENNINGS.—I would like also to ask your Honor if we are warranted in arguing to the jury that if they (the defendants) all knew about this fraudulent arrangement, the Dome Group is certainly void.

The COURT.—O, yes; I don't think there is any

doubt about that. I will say at this time, I have indicated to you, Mr. Jennings, as clearly as I am able to at this time, just what my instructions will be as to the Dome Group. I have devoted the most of my time since I left last night to thinking about it, and I am not satisfied with my conclusions on it yet; but I will endeavor to satisfy myself before to-morrow morning.

Mr. PRATT.—Well, surely, if Captain Barnette and these six people were involved in that fraud, that would make it a dummy location even though the other two were not involved.

The COURT.—Under my view of the case it don't make any difference whether they have or not, because under the decision of the Appellate Court Mr. Ridenour has not selected correctly, and it doesn't make any difference to me whether he was implicated in that fraud or not, Mr. Pratt. I don't see that any stress need be laid on that under the view the Court takes of the case at this time.

AND BE IT FURTHER REMEMBERED that after the evidence in said cause was concluded and before the said cause was submitted to the jury, the plaintiffs requested the Court to charge the jury in words and figures as follows, to wit:

In the District Court, Territory of Alaska, Fourth Division.

No. 1196.

[Instructions Requested by Plaintiffs.]

Plaintiffs request the Court to charge as follows:

* * * * * * * * *

8. DOME GROUP.

Defendants contend and there is evidence to prove that prior to the 23d day of December, 1905 (the date of Rooney's discovery), an association of eight persons consisting of A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk, A. R. Armstrong, Henry Cook and J. C. Ridenour, calling themselves the Dome Group Association had discovered gold on the 160 acres embracing the claim in dispute and had properly marked said 160 acres on the ground so that the boundaries could be readily traced. Plaintiffs admit the discovery of gold, this staking and marking in the *name* of said eight persons, but they say that such location was not a valid one, for the reason that, although it was made in the *name* of eight persons, yet it was not really done by or for said eight persons in good faith, but was in reality a scheme on the part of E. T. Barnette by which said E. T. Barnette was to acquire more than 20 acres of mining ground for himself in one location, in violation of the law which declares that no location shall include more than 20 acres for any individual claimant.

If you find from the evidence that this was the case, then the location by the Dome Group Association

was fraudulent, and null and void, and could and did confer no rights of any kind upon any of the said eight persons nor upon McGinn and Sullivan so far as they claim under said association.

9. Plaintiffs contend and have offered evidence to prove that before the location or attempted location in the name of said eight persons was made, said E. T. Barnette had written to A. T. Armstrong for powers of attorney from him and others authorizing him, Barnette, to locate, enter and take up mining claims and other lands in Alaska, and to do all that was necessary to be done to acquire the right and title to any such mining claims or land as may be taken up, entered or located, and that in the letter from Barnette to Armstrong he stated that he would expect half, and that in reply he received the powers of attorney without qualification or restrictions.

If you find from the evidence that this is true, you are instructed that such transactions would constitute in law a contract, agreement or understanding between said E. T. Barnette and said persons by which said Barnette was to take up or to have taken up mining claims in the names of said persons, and that one-half of all he should take up or have taken up should be his.

10. Plaintiffs further contend and have offered evidence to prove that Barnette being in possession of these powers of attorney, entered into an arrangement with defendants Cook and Ridenour by which Cook and Ridenour were to do the actual work of making a discovery upon and of staking and marking the boundaries of an 160 acre tract, and he was

to furnish the supplies, tools, boiler, etc., necessary for the accomplishment of that purpose, and that they should take up said 160 acre tract in the names of A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk, A. R. Armstrong, Henry Cook and J. C. Ridenour, and that in pursuance to that arrangement the location or attempted location of the Dome Group Association was made. If you find from the evidence that this is true, then Barnette was the principal locator of the Dome Group Association of 160 acres, although he was not a locator by name, and by the use of the names of his friends or relatives has located for his own benefit a greater area of mining ground than that allowed by law. This is what the statute prohibits. The statute says, "No such location shall be made."

11. It would be immaterial in this case whether or not Henry Cook and J. C. Ridenour, McGinn and Sullivan or either of them knew of this arrangement between Barnette and the absent locators, either at the time of the location of the Dome Group or at any other time, and it would be immaterial whether Cook and Ridenour first proposed to Barnette to locate or whether Barnette first proposed to Cook and Ridenour to locate. And it would be immaterial whether they or either of them knew what interest Barnette was to get, or whether Barnette has in fact gotten the interest, and it would be immaterial whether Cook or Ridenour were to get only an eighth a piece. The question is, "Did the location include more than 20 acres for any individual claimant, whether that claimant be a locator

by notice on the ground or of record, or not?"

12. If it did, then the location or attempted location by the Dome Group was invalid, and Rooney had a perfect right to locate the property so far as the Dome Group location is concerned.

12. If the Dome Group title is not valid, then McGinn and Sullivan obtained no title under that location, whether their contract for one-third was made before or after that location.

13. The Court instructs the jury that the life of a mining title to placer ground commences at the date of the discovery of gold within lines plainly marked on the ground so that they can be readily traced.

The defendants in their 2d affirmative defense in the amended answer claim title to the ground in controversy by mesne conveyances based on an alleged location January 2, 1904, by one U. G. Hastings. The plaintiffs contend that the boundaries of the said claim were not marked on the ground so as to *to* be readily traceable or at all, by the said Hastings or by any other person for him, at the said date or at any time prior to Rooney's discovery December 23d, 1905, and that no discovery of gold was made thereon by said Hastings or by any other person for him, at any time. If you find from the evidence that either of these contentions is true, then Hastings never had any mining title to said ground and could convey none to Stafford.

The defendants claim that the said ground was properly staked and marked on the ground January 2, 1904, by one William Woodward as agent for

Hastings, and that a location notice of the claim was recorded at the proper time and place; they further show by evidence that on September 8th, 1905, the said Hastings made a quitclaim deed of his claim to the ground to one Richard Stafford, who on September 23d, 1905, quitclaimed a three-fourths interest therein to Miller, de Journel and Crawford, and through these four persons, by mesne conveyances, they deraign title to said ground based on the Hastings staking.

Upon this last phase of the case as advanced by the defendants, I charge you that if you find from the evidence that up to September 8th, 1905 (the date of the deed from Hastings to Stafford), no discovery of gold had been made within the boundaries of the said claim, either by Hastings or anyone for him, then Hastings had no mining title to said ground which he could convey to said Stafford, even if the lines were plainly marked, and in this condition of things the defendants could not and did not secure any title to said ground from that source. To initiate a mining title, the discovery of gold on the ground must be made either by the locator in person, or by some other person for him, at his instance, direct or indirect, and must be made for the purpose of fixing a mining title in the locator to the ground sought to be appropriated.

* * * * * * * *

19. It is immaterial so far as the rights of the parties are concerned whether the tent of Cook and Ridenour was on number 3 or number 4.

* * * * * * * *

Whereupon said cause was argued to the jury by counsel for the parties respectively, at the conclusion of which the Court instructed the jury as follows, after which the jury retired to deliberate upon their verdict.

[Caption and Title.]

Instructions to Jury.

GENTLEMEN OF THE JURY:

I.

This is an action of ejectment instituted by the plaintiffs to recover from the defendants and each of them the possession of that certain piece or parcel of placer mining ground known as and called NUMBER THREE BELOW DISCOVERY, FIRST TIER, ON THE RIGHT LIMIT OF DOME CREEK, in the Fairbanks Recording District, District of Alaska, and for the further purpose of recovering from the defendants damages for the wrongful withholding of said property from the plaintiffs, and for the gold extracted from said property by the defendants by and through their lessees.

This action was originally commenced against E. T. Barnette, J. C. Ridenour, Henry Cook, John L. McGinn, and M. L. Sullivan, and other parties claimed to be lessees; but said action has been dismissed by the plaintiffs as to all of the defendants save and except the defendants last above named, and you are in this case to consider only the claim of the plaintiffs as against the defendants Barnette, Ridenour, Cook, McGinn and Sullivan.

II.

The Issues.

The plaintiffs allege that at all times since the 21st day of September, 1905, the plaintiffs have been and now are the owners in fee, as against all persons except the United States, of that certain parcel of placer mining ground containing twenty acres situate in the Fairbanks Mining and Recording District in the Territory of Alaska, and more particularly described as the First Tier of Bench Claims on the right limit, adjoining Creek Claim No. 3 Below Discovery, on Dome Creek. That ever since said 21st day of September, 1905, and at the time of the commencement of this action, the plaintiffs have been and now are in the possession of such mining property, except as such possession has been interfered with by the wrongful acts of the defendants, and except as defendants have wrongfully ousted the plaintiffs of possession of the larger portion of said ground. The plaintiffs further allege that in the month of September, 1908, the defendants wrongfully, forcibly, and against the protest of these plaintiffs intruded themselves upon said bench claim and forcibly ousted plaintiffs of their possession thereof, except the possession of the cabin built thereon and occupied by them, and a space immediately around the same necessary for its use as a place of abode, and ever since and now forcibly retain in their exclusive possession all of said bench claim with the exception above stated.

The plaintiffs further allege that the defendants have extracted the sum of $400,000.00 from the property in controversy, and have wasted and destroyed

the value of said mining property to the damage of plaintiffs in the sum of $700,000.00.

III.

The defendants for answer to the complaint of plaintiffs deny that the plaintiffs are the owners of the property in controversy or any portion thereof, and deny that the plaintiffs or any of them ever were the owners of or entitled to the possession of said property or any portion thereof.

The defendants also deny that they ever ousted the plaintiffs from the possession of said property, and further deny that plaintiffs have suffered any damages whatever on account of defendants' operation of said property or on account of any acts of the defendants with reference to said property.

(Dome Group Association Title.)

The defendants for a first affirmative defense allege that Henry Cook, J. C. Ridenour, A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E Armstrong, L. T. Slekirk, A. R. Armstrong, M. L. Sullivan and John L. McGinn are now and for a long time prior to the commencement of this action have been the owners in fee as to all persons save and except the United States, in the possession of and entitled to the possession of that certain piece or parcel of mining ground known as the DOME ASSOCIATION CLAIM, situate on Dome Creek in the Fairbanks Mining District, District of Alaska, which association claim includes the property in controversy herein, and which association claim is more particularly described in the answer herein.

(Stafford Title.)

For a second affirmative defense the defendants

allege that the defendants E. T. Barnette, J. C. Ridenour, Henry Cook, M. L. Sullivan and John L. McGinn are now, and for a long time prior to the commencement of this action have been, the owners in fee and entitled to the sole and exclusive possession of the property described in the complaint of the plaintiffs herein.

(Ridenour Selection Title.)

For a further and third affirmative answer the defendants allege that one J. C. Ridenour, one of the defendants, is now and for a long time hitherto has been the owner in fee of that certain parcel of placer mining ground described in the answer, which includes the larger portion of the property mentioned, and described in the plaintiffs' complaint.

(Reply of Plaintiffs.)

To this answer of the defendants, the plaintiffs filed a reply denying, substantially, the title of the defendants under and by virtue of any of the titles so set up by the defendants, and denying generally all the matters and things set up in said answer except as to the existence of former litigation in respect of the alleged titles of defendants, and they further allege that the said Dome Group Association placer claim is fraudulent and void because the same was located by "dummy" locators.

IV.

The law as to the Issues.

Before you can find a verdict for the plaintiffs you must find by a preponderance of the evidence that at the time they entered upon the premises in controversy and claim to have located the same as a placer mining claim, that the

same was unoccupied, unappropriated public domain of the United States.

V.

THE DOME GROUP ASSOCIATION.

The first affirmative defense under which the defendants claim title to the ground in controversy is made under and by virtue of what is known and styled in the answer as the Dome Group Association claim, which it is conceded includes the property in controversy.

You are instructed that the undisputed evidence shows that at the time of the entry of the plaintiffs upon the ground in controversy, the Dome Group Association Claim had been located and a discovery of gold had been made within the limits of that claim; but the plaintiffs contend that the Dome Group Association Claim is void for the reason, as claimed by the plaintiffs, that the locators of said association claim had agreed among themselves prior to the location thereof, that one E. T. Barnette was to be the owner of and entitled to the possession of an undivided one-third of said associated placer claim.

You are instructed that sections 2330 and 2331 of the Revised Statutes of the United States provide as follows:

"Sec. 2330. Legal subdivisions of forty acres may be subdivided into ten acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made

after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any *bona fide* pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any *bona fide* settler to any purchaser.

Sec. 2331. Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required; and all placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes."

You are further instructed that if any arrangement or understanding was had between E. T. Barnette and the other locators of the Dome Group Association Claim whereby the said Barnette was to acquire an interest in said association claim in excess of twenty acres, provided such understanding

or agreement was entered into before the location of said association claim, would render the said association claim void as to the said Barnette and all the other locators who participated in the understanding or agreement whereby said Barnette was to acquire such interest in said association claim, and said claim would be also void as to all of the locators who had knowledge that said Barnette was to acquire a greater interest in said association claim at or prior to the consummation of said Dome Group Location.

But you are instructed that in order that such an agreement may avoid the Dome Group Association location, you must find that such agreement was entered into prior to the consummation of the location of Dome Group Association; for after such association was located according to law, if you find it was located according to law—that is, by the marking of the boundaries so that the same could be easily traced and the discovery of gold within the exterior boundaries sufficient in law, as you will be hereinafter instructed, whatever agreement might take place between the locators or between the locators and any other person or persons after the consummation of such association location, cannot affect the validity of such location provided the same was valid when located. In other words, an association location may be avoided by any agreement whereby one of the locators or other person or persons is to acquire an interest therein greater than twenty acres, provided such agreement is entered into prior to the consummation of the location. Any agreement

between the locators or between any of the locators and others subsequent to a legal location cannot affect the validity of such association location.

VI.

You are further instructed that if any of the locators of the Dome Group Association entered into any agreement or any understanding with E. T. Barnette whereby the said Barnette was to acquire or become the owner of a greater interest in said association claim than twenty acres, then said location is void as to all who participated in such agreement or understanding, and as to all of such locators who had knowledge of such agreement or understanding prior to said location.

VII.

Right of Selection.

You are further instructed that if you find that said Dome Group Association is rendered void by any such agreement as to certain of the locators and not as to the others, then such locators as did not participate in such understanding or agreement (if you find there was any such understanding or agreement) would be entitled to select twenty (20) acres apiece from the area included within the exterior boundaries of said Dome Group Association Claim, providing such selection were made according to law.

Ridenour Selection.

But you are instructed that the attempted selection made by J. C. Ridenour not having been made according to law, you are therefore not to consider the third affirmative defense of the defendants, that is, that said J. C. Ridenour is the owner of the property in controversy by rea-

son of such selection. And since no valid selection has been made by any of the Dome Group locators, you are not authorized to find a verdict in favor of the defendants by reason of the Dome Group Association location, if you find from the evidence that there was any agreement or understanding between any of the locators and E. T. Barnette that said Barnette should own more than twenty acres of said Dome Group Association claim, provided that such agreement or understanding were made or entered into prior to the consummation of said association location.

VIII.

Power of Attorney.

You are further instructed that the fact that some of the locators of the Dome Group Association claim are nonresidents of Alaska, should not affect your view of said location, for nonresidents may locate mining claims in the District of Alaska, either single or association claims, through their agents the same as if they were residents of the district providing such locations are made according to law.

And you are instructed that any person can locate a mining claim through an agent as effectually as he can locate for himself, and it is not even necessary that his agent should have any written authority to so locate for him. It is sufficient if a person locate a mining claim for another by marking the boundaries of the claim so that the same may be readily traced and discovering gold within the limits of the claim such as would justify a reasonable prudent man not necessarily a skilled miner in spending his

money and time in the development of the ground with the reasonable expectation of developing a paying mine.

IX.

THE HASTINGS-STAFFORD TITLE.

The second affirmative defense under which the defendants claim title to the ground in controversy is the Stafford and Hastings title.

The defendants claim that one U. G. Hastings, by and through his agent, entered upon the premises in controversy in January, 1904, and marked the boundaries of said claim so that the same could be readily traced; that one Richard Stafford thereafter purchased the interest of the said Hastings and made a discovery of gold within the limits of such claim such as would justify a reasonable prudent man not necessarily a skilled miner in prosecuting further work and labor on said claim with the reasonable expectation of developing a paying mine.

You are instructed that if you find from the evidence that the said Hastings through his agent did so mark the boundaries of said claim that the boundaries thereof could be readily traced, and that thereafter the said Hastings conveyed the said parcel of ground to the said Richard Stafford, and that the said Stafford thereafter and before the plaintiff William Rooney entered upon the property for the purpose of staking the same, made a sufficient discovery of gold within the limits of said claim as such discovery is defined to you in these instructions, then your verdict must be for the defendants.

X.

You are further instructed that if the defendants show a superior right to the mining ground in controversy in this case, either through the Dome Group Association location as you are herein instructed, or through the Stafford title as you are herein instructed, your verdict must be for the defendant.

But if you find from the evidence that the said Dome Group association claim was void by reason of any agreement or understanding between the locators and E. T. Barnett, that the said E. T. Barnette should acquire a greater interedt than twenty acres therein; and if you further find from the evidence that the said Stafford title is not valid, either because of the fact that the boundaries thereof were not so marked as to be readily traceable, by the agent of the said Hastings, or that no discovery of gold as defined in these instructions was made within the limits thereof by the said Stafford prior to the location of the plaintiffs, then your verdict must be for the plaintiffs.

XI.

Title of plffs.

The plaintiffs claim that plaintiff William Rooney located the ground in controversy on the 21st day of September, 1905, and that he thereafter and before the commencement of this action conveyed a one-fourth interest therein to each of the plaintiffs herein, so that if you find that at the time the plaintiff Rooney entered up on the ground in controversy the same was unappropriated public land of the United States, and since a discovery of gold and the marking of the boundaries

by said Rooney are not disputed, then you must find for the plaintiffs.

XII.

Title of defts.

And you are further instructed that if you find from the evidence that the Dome Group association claim was a valid mining claim as defined in these instructions, or, that the Hastings and Stafford title at the time the plaintiffs entered upon the ground in controversy, was a valid mining claim as defined in these instructions, then your verdict must be for the defendants. In other words, the defendants are not required to prove the validity of both of said titles; and if you find from the evidence that either the Stafford title or the Dome Group association claim are valid as defined in these instructions, then your verdict must be for the defendants.

XIII.

Province and duties of jury.

You are instructed that the burden of proof is upon the plaintiffs, to establish by a fair preponderance of the evidence that they are the owners and entitled to the possession of the placer mining ground in controversy as alleged in their complaint, and if the plaintiffs fail to establish their title and right of possession by the weight or preponderance of the evidence, then your verdict must be for the defendants; or, if you find that the evidence is equally balanced and does not preponderate in favor of either of the parties to this action, then you will find for the defendants.

XIV.

You are further instructed that if you find from

the evidence that the plaintiffs have established the allegations of their complaint by a fair preponderance of the evidence, then the burden of proof is upon the defendants to show that the ground in dispute was and is included within a valid location of the Dome Group association claim, or a valid location of the Stafford Hastings claim, and that the plaintiffs have no title or right of possession superior to their own.

In other words, each party claiming adversely the title and right to possession of a mining claim or portion thereof must rely upon the strength of his own title, and not upon the weakness of the title of his adversary; and such title and right to possession must be established by the weight or preponderance of evidence.

By the weight or preponderance of the evidence is meant that superior weight of evidence which is satisfying to your minds.

XV.

You are instructed that you are the sole judges of all questions of fact, and of the effect of the evidence and the weight to be given to the testimony of the witnesses; but your power in that respect is not arbitrary, but to be exercised by you with legal discretion and in subordination to the rules of evidence laid down in these instructions.

In considering the evidence in this case you are not bound to find a verdict in conformity with the declarations or testimony of any number of witnesses when their evidence does not produce conviction in your minds, against a lesser number of witnesses

or other evidence which is satisfying to your minds.

The weight of the evidence does not depend so much upon the number of witnesses who testify as upon the character and probability of the facts stated by them, and the opportunity the witnesses had of seeing and knowing the facts stated by them.

XVI.

If you find that any witness has wilfully testified falsely as to any material matter in this case, you may distrust any part or all of the testimony of such witness, except as the same is corroborated by other creditable testimony. And if you believe from the evidence that any witness appearing before you in this case has wilfully testified falsely as to any material matter, you are at liberty to reject the entire testimony of such witness; but you are not bound to reject the entire testimony of a witness because you believe he has testified falsely in some part of his testimony—you should reject the false part, and should give to the other parts such weight as you deem they are justly entitled to receive. You should not fail to weigh and consider fairly and give proper effect to all testimony which you consider truthful.

You are also instructed that if you believe from the evidence that any witness has been successfully impeached or contradicted in regard to any matter or thing material to the issues in this case as defined in these instructions, you will be justified in disregarding the entire testimony of such witness except in so far as you find the same is corroborated by other credible evidence in the case, or by the facts and circumstances proved on the trial.

XVII.

In determining as to the credit you will give to a witness and the weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to or feeling for or against any of the parties to the case; the probability or improbability of such witness' statements and the opportunity he had to observe and to be informed as to matters respecting which he gave testimony before you, and the inclination he evinced, in your judgment, to speak the truth, or otherwise, as to matters within the knowledge of such witness.

It is your duty to give to the testimony of each and all of the witnesses appearing before you such credit as you consider the same justly entitled to receive.

And in this connection you are instructed that evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is within the power of the one side to produce and of the other to contradict; and therefore, that if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party offer*e*ring the same, then the evidence so offered should be viewed with distrust.

XVIII.

There is some evidence in this case as to oral admissions of some of the parties to the case to persons who have appeared before you as witnesses and testi-

fied to the same.

I charge you that owing to the infirmity of the human mind, and the inability of witnesses to repeat the exact language used by persons alleged to have made such oral admissions, and to understand it correctly and repeat it with all its intended meaning, you are to view the evidence as to such oral admissions with caution; but if you shall find that such admissions were actually made by the person or persons alleged to have made the same, you should consider them as candidly and fairly as other evidence in the case and give them weight accordingly.

XIX.

You are instructed that you should not consider any evidence sought to be introduced but excluded by the Court; nor should you consider any evidence stricken from the record by the Court; nor should you take into account in making up your verdict any knowledge or information known to you not derived from the evidence given by the witnesses on the stand. Whatever verdict is warranted by the evidence under the instructions of the Court you should return, as you have sworn so to do.

XX.

You are further instructed, Gentlemen of the Jury, that in this case, as in every civil case tried before a jury, the jury and the Judge of the court have separate functions to perform. It is your duty to hear all of the evidence, all of which is addressed to you, and thereupon to decide and determine the questions of fact; it is the duty of the Judge of the court to pass upon all questions of law

involved in the trial of the case, and to instruct you upon the law applicable to the facts and evidence; and the law makes it your duty to accept as law what is laid down as such by the court in these instructions.

And, since you are sole judges of what facts are proven on the trial, you should not permit the remarks or expressions of counsel to influence your judgment, except as the same conform to the facts proven, or are reasonably deducible from such facts and the law of the case as laid down in these instructions.

XXI.

Location and discovery of mining claim.

You are further instructed, Gentlemen of the Jury, that in order to constitute a valid location of a placer mining claim the following facts must appear:

1. That the ground included within such location at the time of entry thereon must be unappropriated public domain of the United States.

2. The locator thereof, or someone in his behalf, must mark the boundaries thereof on the ground, by reference to permanent stakes, markings or monuments, so that the exterior boundaries thereof may be readily traced.

3. The locator must make a discovery of gold within the exterior boundaries of his claim such as would justify an ordinarily prudent man in the further exploration and development of the claim for mining purposes.

XXII.

You are further instructed that all mineral de-

posits in land of the United States in Alaska are open to exploration and purchase by citizens of the United States, under the regulations prescribed by law. And while under such regulations, in order to make a valid placer mining location in Alaska, it is necessary (1) to make a valid discovery of mineral upon or within the ground to be located, and (2) to mark the boundaries of the property upon the ground so that the same may be readily traced, the order in which these acts are to be done is immaterial, provided they shall have been complied with before the rights of others have intervened.

It is not essential that the discovery shall precede or co-exist with the demarkation of the boundaries. The discovery may be made first, and the marking of the boundaries subsequent, or the marking of the boundaries may be first and the discovery subsequent; and when both are effected, they operate to perfect a title as against all the world save those whose rights have intervened.

And in this case, if you find from the evidence that the U. G. Hastings located the ground in controversy through his agent in January, 1904, and thereafter the said Richard Stafford, as successor in interest of the said Hastings, made a discovery of gold within the exterior boundaries thereof, but that such discovery of gold was made before the plaintiffs initiated their title, and that at the time of such discovery of gold by Stafford (if you find there was a sufficient discovery by Stafford as defined in these instructions), the boundaries of said claim had been staked and marked by the agent of the said Hastings

as to be readily traced at the time of the discovery of gold within the lines thereof by said Stafford, then you are instructed that the fact that the discovery may have occurred long subsequent to the marking of the boundaries cannot affect the rights of the defendants, provided you find that the markings by Hastings through his agent and the discovery of gold by Stafford within the limits of the claim, occurred prior to the location by the plaintiff Rooney.

XXIII.

You are further instructed that the life of a mining claim begins from the date of a discovery of gold within the limits of the claim in sufficient quantities to justify an ordinarily prudent person, not necessarily a skilled miner, in doing further work and labor upon the property with a reasonable expectation of developing a paying mine. And you are therefore instructed that it is immaterial where the discovery of gold is made, provided it is sufficient in law and is made within the exterior limits of the claim.

The discovery may be made upon the surface of the ground or in the interior of the earth within the limits of the claim, provided it be in sufficient quantity, staking into consideration the situation and location of the claim, with reference to other mining claims and the formation and character of the country, as to justify a reasonably prudent man not necessarily a skilled miner, in doing further work and development upon the property with the reasonable expectation of developing a paying mine.

XXIV.

You are instructed that under the laws of the District of Alaska, it is not required that a locator shall record his notice of location. But you are instructed that the laws of Alaska provide that the locator may record within the records of the district within which the property is located a notice of location; and when said notice is recorded, in order to be of any beneficial advantage to the locator, must contain the names of the locators, the date of the location, and such descriptive language with reference to natural objects and permanent monuments as the same can be readily identified upon the ground.

Notice of location.

While the law in reference to filing notice of location is merely directory, yet from the recording of such notice of location certain benefits arise. Where such recording is authorized by law, it is *prima facie* evidence of such facts as are required by law to be stated therein, provided they are sufficiently staked. The general purpose of the record is to operate as notice of an asserted claim.

I instruct you that a notice of location, duly and regularly recorded, which contains the name of the locators, the date of the location, and such a description of the property with reference to natural objects and permanent monuments so that the same may be readily identified, operates as notice of the fact to all the world of the asserted claim of the locator. But when the locator's right is challenged, he is compelled to establish by proof outside of the certificate or notice, all of the essential facts necessary to con-

stitute a good and valid location. These facts—that is, the marking of the boundaries as heretofore explained to you, and the discovery of gold as heretofore explained to you—being once proved, the recorded certificate may be considered as *prima facie* evidence of such other facts as may be required to be stated therein.

XXV.

Re Gunnison etc.

Something has appeared in this case as to what the decision of Judge Gunnison was in some other case, and in that connection you are instructed that you are not to consider such evidence as at all bearing upon the question as to whether or not gold had been found upon the claim in controversy in this case before Rooney located, nor as to whether or not gold could be found upon said claim, nor as to whether or not, even if it had been found, it was sufficient in quantity and found under such circumstances as to justify an ordinarily prudent man, not necessarily a skilled miner, in the further expenditure of his time and money. These are questions which you are to determine solely from the evidence before you in this case. And if, from the evidence in this case, and under the instructions as heretofore given you, you should find that Rooney was the owner of the claim, you should not be influenced by and you should not consider what Judge Gunnison may or may not have decided in some other case. But the defendants allege that they were influenced by that decision in the purchase of the Stafford title; if they were so influenced, then you may consider that fact only in

mitigation of damages.

XXVI.

You are instructed that it is immaterial in this case whether Rooney did or did not know, or had not heard, that the property in dispute was a part of the ground claimed by the Dome Group Association; and it is immaterial what reasons actuated him to enter thereon and locate, so long as the ground included in his location was at the time of such entry unappropriated public domain of the United States, that is, ground not covered by any prior valid subsisting location.

Reasons of Rooney Location.

XXVII.

The Court instructs the jury that if you find from the evidence that in September, 1908, the defendants Barnette, Cook, Ridenour, McGinn and Sullivan, through their lessees Enstrom Bros., Atwell & Riley and August Peterson, entered upon the ground in dispute over the protests and objections of the plaintiffs, at a time when the plaintiffs were in the actual physical possession thereof, under a claim of title, and proceeded to mine the same, and thereafter and until the close of the season of 1909 did continue to mine and extract gold therefrom; and you further find that at the time of such entry the plaintiff Rooney and his co-plaintiffs were the owners of and entitled to the immediate possession thereof, then the defendants Barnette, Cook, Ridenour, McGinn and Sullivan are liable in damages to the plaintiffs in the gross amount and value of all gold extracted by them during such period, admitted to be $263,719.00, unless you should further

Measure of damages.

find and believe from the evidence that at the time of such entry by the defendants named, they in good faith believed and had good reason to believe that they had a good title to and right of possession of said ground under the Dome Group Association or the Hastings location, in which latter situation the defendants named would only be liable in damages to the plaintiffs for the amount of the royalties received by them from their lessees, admitted to have been $67,061.00.

This rule for the measure of damages as applied to the evidence is subject to this addition: That if you find from the evidence that the defendants, through their lessees, wilfully and knowingly commingled pay-dirt from a shaft on No. 2 with a dump of pay-dirt hoisted from the shaft on No. 3 bench on the ground in controversy, in such manner as to render it difficult or impossible to apportion the gold from the dirt so commingled, then they should also be charged with the whole amount extracted from the pay-dirt so commingled, upon the basis above described—that is, for the whole amount of gold extracted from dirt brought down from No. 2, which should be added to the said sum of $263,719.00, and a verdict returned for the whole amount—or for the royalty, according to whether you find the defendants did or did not honestly believe that the ground was theirs.

Dated May 27th, 1910.

THOMAS R. LYONS,
District Judge.

[Endorsed]: Filed May 27, 1910.

AND BE IT FURTHER REMEMBERED, that before the jury had retired to deliberate upon their verdict, the plaintiffs duly excepted to the refusal of the Court to give the instructions asked by the plaintiffs and also duly excepted to instructions given by the Court, as follows:

[Instructions Requested by Plaintiff, Refused, and to Which Exception was Taken.]

[Caption and Title.]

At the conclusion of all the testimony in this case, and before the Court instructed the jury as to their deliberations, and before the jury retired to deliberate upon their verdict, plaintiffs requested the Court to charge the jury as follows: "Under the evidence in this case it is your duty to find that the plaintiffs were the owners and entitled to the possession of the property in dispute, to wit: Claim No. 3 Below Discovery, First Tier, Right Limit, Dome Creek, Fairbanks Recording District, and accordingly you will find in favor of plaintiffs, together with such damages as you may find that they are entitled to under the further instructions of this Court." The Court refused to so instruct the jury and plaintiffs then and there excepted.

At the same time plaintiffs requested the Court to instruct the jury as follows: "You are instructed that so far as the title of the property in dispute is concerned you are not to consider the first affirmative defense of defendants, to wit, the alleged Dome Group Location." The Court refused to so instruct the jury and plaintiffs then and there excepted.

At the same time, plaintiffs requested the Court to

instruct the jury as follows: "You are instructed that so far as the title is concerned, you should not consider the second affirmative defense of defendants, to wit, the so-called Stafford Claim." The Court refused to so instruct the jury and plaintiffs then and there excepted.

At the same time plaintiffs requested the Court to instruct the jury as follows: "You are instructed that so far as the title of the property in dispute is concerned, you should not consider the third affirmative defense, to wit, the so-called Ridenour title." This request was by the Court granted and said instruction given in the general charge to the jury.

[Exceptions to Instructions.]

After said jury had been charged by the Court and before they had retired to deliberate upon their verdict or had agreed upon a verdict, plaintiffs duly excepted to the instructions to the jury, as follows:

(1) Plaintiffs excepted to the instruction given in No. 4, in that the words "unoccupied and unappropriated public domain of the United States" are unexplained in said instruction or elsewhere in the instructions, and the jury is nowhere given to understand that said words mean, in this case, "unoccupied and unappropriated under and by virtue of any valid subsisting location," and said instruction as given tends to lead the jury to believe that because Cook and Ridenour were living upon that portion of the Dome Group Association claim known as No. 3, the property in controversy, at the time plaintiffs marked and staked the same, the said Claim No. 3 was occupied and appropriated.

(2) Plaintiffs excepted to that portion of the instruction given No. 5 in which the jury is told that the question as to the validity and invalidity of the Dome Group Association claim is dependent upon a knowledge by all the locators thereof of the fact that by such location E. T. Barnette was to acquire more than 20 acres; said portion of said instruction is not the law and is irreconcilable with that portion thereof which declares, "In other words, an association location may be avoided by any agreement whereby one of the locators or other person or persons is to acquire an interest greater than 20 acres, etc.," and so tends to mislead and confuse the jury.

(3) Plaintiffs excepted to instructions given No. VI in that it is not the law that the validity or invalidity of the Dome Group Association location depended upon a knowledge by all the participant of the fact that by such location E. T. Barnette or any other person was to acquire more than 20 acres; it being sufficient to avoid the location if any of the participants had knowledge of the said fact.

(4) Plaintiffs excepted to instruction given No. VII, in that th*ee* was undisputed evidence conclusively establishing the fact that at the time of the location of the Dome Group by said Association there was an agreement or understanding between at least six of the locators thereof and said Barnette that the latter was to acquire by said location more than 20 acres and on that point there was nothing to submit to the jury.

(5) Plaintiffs excepted to instruction given No. VIII, in that the same was inapplicable under any of the issues and immaterial and unnecessary, and

tended to mislead the jury into an exaggerated idea of the importance of an undisputed principle of law and an uncontested matter of fact.

(VI) Plaintiffs excepted to instruction given No. IX, in that the undisputed evidence showed that no discovery was at any time made by or for Hastings and that if Stafford made any discovery or any was made for him he did not mark out his boundaries, or stake, or have the boundaries marked or staked, or adopt Hastings' marking or staking, before plaintiffs had marked and discovered.

(7) Plaintiffs excepted to instruction given No. XI, in that the word "unappropriated" is not defined, and the jury is nowhere given to understand that it means "not covered by a valid subsisting location" or "in the actual possession of an adverse claimant."

(8) Plaintiffs excepted to instruction given No. XXI for the reason instruction No. XI was excepted to.

(9) Plaintiffs excepted to instruction given No. XXII, in that the same is not the law in that Stafford, conceding that he made a discovery, did nothing to mark his boundaries or have them marked for him, or adopt Hastings' stakes, or give any notice whatsoever that he claimed said No. 3, prior to plaintiffs completed location.

(10) Plaintiffs excepted to the instruction given No. XXIV, in that the same is inapplicable to any of the issues in this case, is unnecessary, and tends to confuse the jury by directing their attention to an undisputed principle of law and an uncontested matter of fact.

[Exceptions to Instructions Requested and Refused.]

After the jury had been charged and before they had retired to deliberate upon their verdict, and in open court, plaintiffs duly excepted to the refusal of the Court to give instructions Nos. 8 to 15, inclusive, 19 and 20, requested by plaintiffs; said requested instructions having been requested *seriatim,* having been refused *seriatim* and the exceptions to said refusals having been made *seriatim.*

LOUIS K. PRATT,
R. W. JENNINGS,
Attys. for Pltfs.

[Certificate to Exceptions.]

The above is a true and correct statement of exceptions taken and the time and place same were taken, as purported above.

Judge,
THOMAS R. LYONS.

[Endorsed]: Filed May 30, 1910.

AND BE IT FURTHER REMEMBERED, that on the 27th day of May, A. D. 1910, the said jury having agreed upon their verdict in said cause, returned into Court the verdict so found, which said verdict was in words and figures as follows, to wit:

[Caption and Title.]

Verdict [in Bill of Exceptions.]

We, the jury, duly sworn and impanelled in the above-entitled cause, find in favor of the defendants and against the plaintiffs, and find that the plaintiffs are not entitled to the possession of the property de-

scribed in the complaint or any part thereof, and that the defendants are as against the plaintiffs herein the owners in fee and entitled to the possession of the whole of said property described in the complaint in this action and which is known and designated therein as Bench Claim Number Three, First tier, right limit, Dome Creek.

O. H. BERNARD,
Foreman.

Entered in Court Journal No. 10, page 19.

[Endorsed]: Filed May 27, 1910.

And thereafter, and within the time allowed by law, the plaintiffs filed the following motion; which said motion was by the Court overruled, and plaintiffs excepted.

[Caption and Title.]

Motion for a Particular Judgment.

Come now the plaintiffs in this cause, and, not waiving their motion for a new trial heretofore filed herein, move the Court as follows:

That this Court do, in case said motion for a new trial be denied, make and enter a particular judgment herein that plaintiffs are now and were at the time of the commencement of this action, and defendants are not and were not at the commencement of this action, the owners of and entitled to the possession of the mining ground in controversy, and that said plaintiffs do have and recover of and from defendants the sum of $67,000 (that being the amount of royalty or rent admitted by defendants to have been received by them).

This motion is made and based upon the ground: That the evidence at the trial hereof showed that plaintiffs were the owners of said ground, and that they have been damaged in the amount named by the trespasses of defendant and there was no evidence to the contrary.

LOUIS K. PRATT,
R. W. JENNINGS,
Attys. for Plaintiffs.

Copy received and service accepted May 3*L*, 1910.

JOHN L. McGINN,
Atty. for Defendants.

[Endorsed]: Filed May 31, 1910.

AND BE IT FURTHER REMEMBERED, that thereafter, and within the time allowed by law, the plaintiffs filed their motion for a new trial, which motion was in words and figures as follows; which said motion was by the Court overruled and the plaintiffs excepted; and thereupon the Court entered judgment for the defendants.

[Caption and Title.]

Motion for New Trial.

Plaintiffs herein, considering themselves aggrieved by the verdict of the jury heretofore rendered herein, move the Court to set aside said verdict and to order a new trial hereof; for the following causes materially affecting the substantial rights of plaintiffs;

(1) Errors of law occurring at the trial and excepted to at the time by plaintiffs—which said errors consist of the following: (A) The Court erred in refusing to instruct the jury, at the conclusion of all evidence, that under the evidence in this case they

should return a verdict for plaintiffs for the recovery of the property in dispute and for damages according as they might find plaintiffs entitled to under further instructions;

(B) The Court erred in refusing to instruct the jury that so far as the title to the property in dispute was concerned, they should not consider the first affirmative defense—to wit, the alleged Dome Group location.

(C) The Court erred in refusing to instruct the jury that so far as the title is concerned, they should not consider the second affirmative defense, to wit, the alleged Stafford title.

(D) The Court erred in refusing to instruct the jury as requested in the 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 18th, 19th, and 20th, instructions requested by plaintiffs.

(E) The Court erred in the 4th instruction given in that in neither said instruction nor in any other is it explained that the words "unoccupied and unappropriated public domain of the United States" mean only "unoccupied and unappropriated by a valid, subsisting location," and the use, in said instruction, of the words "unoccupied and unappropriated" was calculated to mislead the jury into believing that because Cook and Ridenour were living upon No. 3 at the time plaintiffs staked said No. 3, they, said Cook and Ridenour, were in occupancy of No. 3 and same was appropriated.

(F) The Court erred in that part of the instruction given to the jury, in which the jury is told that the question of the validity or the invalidity of the

Dome Group Association location is dependent upon the knowledge by *all* the locators thereof of the fact that by such location E. T. Barnette was to acquire more than 20 acres; said part of said instruction is not the law, and is irreconcilable with that portion which declares, "In other words, an association location may be avoided by any agreement whereby one of the locators or other person or persons is to acquire an interest greater than 20 acres, provided, etc.," and being so irreconcilable tended to mislead and confuse the jury.

(G) The Court erred in the VIth instruction given, in that the jury are thereby told that the validity or invalidity of the Dome Group Association location depends upon a knowledge by *all* the participants of the fact that by such location E. T. Barnette was to acquire *more 20* acres.

(H) The Court erred in the VIIth instruction given, in that there was undisputed evidence conclusively establishing the fact that at the time of the location of the Dome Group Association claim there was agreement or understanding between at least six of the locators and E. T. Barnette that the latter was to obtain more than 20 acres by such location and so there was nothing to submit to the jury on the question of the Dome Group title.

(I) The Court erred in the VIIIth instruction given, in that the same was inapplicable under any of the issues or evidence in this case and could not but mislead the jury into an exaggerated idea of the importance of the matters charged upon therein and thus distract their minds from the real issues con-

cerning the validity of the Dome Group Association location.

(J) The Court erred in the 9th instruction *given* in that the same does not state the law.

(K) The Court erred in the XIth instruction given, in that in said instruction the word "unappropriated" is not defined nor is the jury given to understand that the word means "covered by a prior valid location or "in the actual possession of another according to law."

(L) Plaintiff excepts to the XXIst instruction given, for the reason that same does not state the law.

(M) The Court erred in the XXIInd instruction given, in that same does not state the law.

(N) The Court erred in giving the XXIVth instruction, in that same is inapplicable to any of the contentions in this case, is unnecessary and tends to give the jury an exaggerated idea of the importance of an undisputed and immaterial matter and to direct their attention to a consideration of immaterial matters.

II. Insufficiency of the evidence to justify the verdict and that the verdict is against the law.

L. K. PRATT,
R. W. JENNINGS,
Attorneys for Plaintiffs.

Copy received and service accepted this 30th May, 1910.

JOHN L. McGINN,
Attorney for Defendant.

[Endorsed]: Filed May 30, 1910.

[Certificate to Bill of Exceptions.]

JUDGE'S CERTIFICATE.

I, Thomas R. Lyons, one of the Judges of the United States District Court for the District of Alaska, being the Judge who presided at the trial of the within entitled cause, do hereby certify that the within and foregoing Bill of Exceptions was duly filed in the above-entitled court and presented to me for signature, by the counsel for the plaintiff, and for settlement and certification, within the time and in the manner prescribed by the rules and practice of Court; and having examined the same and found it to be true and correct, I do now within said time allow, settle and certify the same, and order the same to be filed and become a part of the record herein as a true and correct Bill of Exceptions.

AND I DO FURTHER CERTIFY that said Bill of Exceptions contains the entire *voir dire* examination of the juror, Bernard, and all that part of the *voir dire* examination of the juror Derby concerning his inhabitancy of the District of Alaska.

AND I DO FURTHER CERTIFY that said Bill of Exceptions contains all of the evidence material to or bearing upon (1) plaintiffs' title and ownership of the premises in controversy,—the ouster of plaintiffs from the possession of said premises and their damages thereby; (2) the validity or invalidity of the Dome Group Association location or claim; (3) the staking, recording, marking, working and possession of the claim in controversy by or for Woodward, Hastings or Stafford, and the discovery of gold within the limits of said claim by or for said persons,

or any of them.

And it contains all the instructions to the jury and all the evidence material to or bearing upon or necessary to a fair and intelligent determination of the correctness of any ruling made, or instrument gives, to which exception has been taken.

THOMAS R. LYONS,
Judge.

May 8, 1911.

Entered in Court Journal No. 11, page 143.

[Endorsed]: Filed May 23, 1911.

[Caption and Title.]

Assignment of Errors.

The plaintiffs in error, plaintiffs in the court below, will rely for a reversal of this cause by the United States Circuit Court of Appeals for the Ninth Circuit, on the following errors committed by the trial court as shown by the record:

I.

The Court erred in overruling the challenge for cause interposed by plaintiffs in the trial court to the juror Derby.

II.

The Court erred in overruling the objection of plaintiffs below to the introduction in evidence by defendants of Exhibit "H," which was a deed dated December 15, 1909, from R. C. Wood to the defendants.

III.

The Court erred in refusing the request of plain-

tiffs below for a directed verdict made at the close of all the evidence.

IV.

The Court erred in refusing to instruct the jury not to consider the first affirmative defense, to wit, the alleged Dome Group location.

V.

The Court erred in refusing to instruct the jury not to consider the second affirmative defense, to wit, the so-called Stafford claim.

VI.

The Court erred in refusing to give and read to the jury special instruction number 8 tendered by the plaintiffs below as follows:

"Defendants contend and there is evidence to prove that prior to the 23d day of December, 1905 (the date of Rooney's discovery), an association of eight persons consisting of A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk, A. E. Armstrong, Henry Cook and J. C. Ridenour, calling themselves the Dome Group Association, had discovered gold on the 160 acres embracing the claim in dispute and had properly marked said 160 acres on the ground so that the boundaries could be readily traced. Plaintiffs admit the discovery of gold, this staking and marking in the *name* of said eight persons, but they say that such location was not a valid one for the reason that, although it was made in the *name* of eight persons, yet it was not really done by or for said eight persons in good faith, but was in reality a scheme on the part of E. T. Barnette by which said E. T. Barnette was to

acquire more than 20 acres of mining ground for himself in one location, in violation of the law which declares that no location shall include more than 20 acres for any individual claimant.

If you find from the evidence that this was the case, then the location by the Dome Group Association was fraudlent and null and void and could and did confer no rights of any "kind upon any of the said eight persons nor upon McGinn and Sullivan so far as they claim under said Association."

VII.

The Court erred in refusing to instruct the jury as requested by plaintiffs below in their special instruction number 9; which is in the following language:

"Plaintiffs contend and have offered evidence to prove that before the location or attempted location in the name of said eight persons was made said E. T. Barnette had written to A. T. Armstrong for powers of attorney from him and others authorizing him, Barnette, to locate, enter and take up mining claims and other lands in Alaska and to do all that is necessary to be done to acquire the right and title to any such mining claims or land as may be taken up, entered or located, and that in the letter from Barnette to Armstrong he stated that he would expect half, and that in reply he received the powers of attorney without qualifications or restrictions.

If you find from the evidence that this is true, you are instructed that such transactions would constitute in law a contract, agreement or understanding between said E. T. Barnette, and said persons

by which said Barnette was to take up or to have taken up mining claims in the names of said persons and that one-half of all he should take up or have taken up should be his."

VIII.

The Court erred in refusing to read to the jury as part of his instructions special instruction prepared by plaintiffs below and marked number 10, which was as follows:

"Plaintiffs further contend and have offered evidence to prove that Barnette being in possession of these powers of attorney, entered into an agrangement with defendants Cook and Ridenour by which Cook and Ridenour were to do the actual work of making a discovery upon and of staking and marking the baoundaries of an 160 acre tract and he was to furnish the supplies, tools, boiler, etc., necessary for the accomplishment of that purpose, and that they should take up said 160 acre tract in the names of A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk, A. R. Armstrong, Henry Cook and J. C. Ridenour, and that in pursuance of that arrangement the location or attempted location of the Dome Group Association was made. If you find from the evidence that this is true, then Barentte was the principal locator of the Dome Group Association of 160 acres, although he was not a locator by name, and by the use of the names of his friends or relatives has located for his own benefit a greater area of mining ground than that allowed by law. This is what the statue prohibits. The statute says, 'No such location shall be made.'"

IX.

The Court erred in failing to give and read to the jury the special instruction of plaintiffs below marked number 11, which reads as follows:

"It would be immaterial in this case whether or not Henry Cook and J. C. Ridenour, McGinn and Sullivan, or either of them, knew of this arrangement between Barnette and the absent locators, either at the time of the location of the Dome Group or at any other time, and it would be immaterial whether Cook and Ridenour first proposed to Barnette to locate or whether Barnette first proposed to Cook and Ridenour to locate. And it would be immaterial whether they or either of them knew what interest Barnette was to get or whether Barnette has in fact gotten the interest, and it would be immaterial whether Cook or Ridenour were to get only an eighth apiece. The question is, 'Did the location include more than 20 acres for any individual claimant, whether that claimant be a locator by notice on the ground or of record, or not.'

If it did, then the location or attempted location by the Dome Group was invalid, and Rooney had a perfect right to locate the property so far as the Dome Group location is concerned."

X.

The Court erred in refusing to instruct the jury as requested in plaintiffs' instruction number 13, which reads as follows:

"The Court instructs the jury that the life of a mining title to placer ground commences at the date of the discovery of gold within lines plainly marked

on the ground so that they can be readily traced.

The defendants in their 2d affirmative defense in the amended answer claim title to the ground in controversy by mense conveyance based on an alleged location January 2, 1904, by one U. G. Hastings. The plaintiffs contend that the boundaries of the said claim were not marked on the ground so as to be readily traceable or at all, by the said Hastings or by any other person for him, at the said date or at any time prior to Rooney's Discovery, December 23d, 1905, and that no discovery of gold was made thereon by said Hastings or by any other person for him, at any time. If you find from the evidence that either of these contentions is true, then Hastings never had any mining title to said ground and could convey none to Stafford.

The defendants claim that the said ground was properly staked and marked on the ground January 2, 1904, by one William Woodward as agent for Hastings, and that a location notice of the claim was recorded at the proper time and place; they further show by evidence that on September 8th, 1905, the said Hastings made a quitclaim deed of his claim to the ground to one Richard Stafford, who on September 23d, 1905, quitclaimed a three-fourths interest therein to Miller, De Journal and Crawford and through these four persons, by mense conveyances, they deraign title to said ground based on the Hastings staking.

Upon this last phase of the case as advanced by the defendants, I charge you that if you find from the evidence that up to September 8th, 1905 (the

date of the deed from Hastings to Stafford), no discovery of gold had been made within the boundaries of the said claim, either by Hastings or anyone for him, then Hastings had no mining title to said ground which he could convey to said Stafford, even if the lines were plainly marked, and in this condition of things the defendants could not and did not secure any title to said ground from that source. To initiate a mining title, the discovery of gold on the ground, must be made, either by the locator in person, or by some other person for him at his instance, direct or indirect, and must be made for the purpose of fixing a mining title in the locator to the ground sought to be appropriated."

XI.

The Court erred in refusing to instruct the jury as requested in instruction number 19 tendered by the plaintiffs, which reads as follows:

"It is immaterial, so far as the rights of the parties are concerned, whether the tent of Cook and Ridenour was on number 3 or number 4."

XII.

The Court erred in reading to the jury that part of its general charge designated therein as number 4, in the following language:

"Before you can find a verdict for the plaintiffs you must find by a preponderance of the evidence that at the time they entered upon the premises in controversy and claim to have located the same as a placer mining claim, that the same was unoccupied, unappropriated public domain of the United States." (Tr. p. 336.)

XIII.

The Court erred in that part of its instructions numbers 5 and 6 therein, which read as follows:

"THE DOME GROUP ASSOCIATION.

No. 5: The first affirmative defence under which the defendants claim title to the ground in controversy is made under and by virtue of what is known and styled in the answer as the Dome Group Association claim, which it is conceded includes the property in controversy.

You are instructed that the undisputed evidence shows that at the time of the entry of the plaintiffs upon the ground in controversy, the Dome Group Association claim had been located and a discovery of gold had been made within the limits of that claim; but the plaintiffs contend that the Dome Group Association claim is void, for the reason, as claimed by the plaintiffs, that the locators of said association claim had agreed among themselves prior to the location thereof, that one E. T. Barnette was to be the owner of and entitled to the possession of an undivided one-third of said associated placer claim.

You are instructed that sections 2330 and 2331 of the Revised Statutes of the United States provide as follows:

Sec. 2330. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after

the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any *bona fide* pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any *bona fide* settler to any purchaser.

Sec. 2331. Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required; and all placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes."

You are further instructed that if any arrangement or understanding was had between E. T. Barnette and the other locators of the Dome Group Association claim whereby the said Barnette was to acquire an interest in said association claim in excess of twenty acres, provided such understanding or agreement was entered into before the location of

said association claim, would render the said association claim void as to the said Barnette and all the other locators who participated in the understanding or agreement whereby said Barnette was to acquire such interest in said association claim, and said claim would be also void as to all of the locators who had knowledge that said Barnette was to acquire greater interest in said association claim at or prior to the consummation of said Dome Group Location.

But you are instructed that in order that such an agreement may avoid the Dome Group Association location, you must find that such agreement was entered into prior to the consummation of the location of Dome Group Association; for after such association was located according to law, if you find it was located according to law—that is, by the marking of the boundaries so that same could be readily traced and the discovery of gold within the exterior boundaries sufficient in law as you will be hereinafter instructed, whatever agreement might take place between the locators or between the locators and any other person or persons after the consummation of such association location, cannot affect the validity of such location provided the same was valid when located. In other words, an association location may be avoided by any agreement whereby one of the locators or other person or persons is to acquire an interest therein greater than twenty acres, provided such agreement is entered into prior to the consummation of the location. Any agreement between the locators or between any of the locators and others subsequent to a legal location cannot affect the

validity of such association location."

(Number 6.)

"You are further instructed that if any of the locators of the Dome Group Association entered into any agreement or any understanding with E. T. Barnette whereby the said Barnette was to acquire or become the owner of a greater interest in said association claim than twenty acres, then said location is void as to all who participated in such agreement or understanding, and as to all of such locators who had knowledge of such agreement or understanding prior to said location."

XIV.

The Court erred in its general charge in instruction therein designated as number 7, which is in the following language:

"You are further instructed that if you find that said Dome Group Association is rendered void by any such agreement as to certain of the locators and not as to the others, then such locators as did not participate in such understanding or agreement (if you find there was any such understanding or agreement) would be entitled to select twenty (20) acres apiece from the area included within the exterior boundaries of said Dome Group Association claim, provided such selection were made according to law.

But you are instructed that the attempted selection made by J. C. Ridenour not having been made according to law, you are therefore not to consider the third affirmative defense of the defendants, that is, that said J. C. Ridenour is the owner of the property in controversy by reason of such selection.

And since no valid selection has been made by any of the Dome Group locators, you are not authorized to find a verdict in favor of the defendants by reason of the Dome Group Association location, if you find from the evidence that there was any agreement or understanding between any of the locators and E. T. Barnette that said Barnette should own more than twenty acres of said Dome Group Association claim, provided that such agreement or understanding were made or entered into prior to the consummation of said association location."

XV.

The Court erred in giving and reading to the jury as a part of its general charge instruction therein numbered 9, which reads as follows:

"THE HASTINGS-STAFFORD TITLE.

The second affirmative defence under which the defendants claim title to the ground in controversy is the Stafford and Hastings title.

The defendants claim that one U. G. Hastings, by and through his agent entered upon the premises in controversy in January, 1904, and marked the boundaries of said claim so that the same could be readily traced; that one Richard Stafford thereafter purchased the interest of the said Hastings and made a discovery of gold within the limits of such claim such as would justify a reasonably prudent man not necessarily a skilled miner in prosecuting further work and labor on said claim with the reasonable expectation of developing a paying mine.

You are instructed that if you find from the evidence that the said Hastings through his agent did

so mark the boundaries of said claim that the boundaries thereof could be readily traced, and that thereafter the said Hastings conveyed the said parcel of ground to the said Richard Stafford, and that the said Stafford thereafter and before the plaintiff William Rooney entered upon the property for the purpose of staking the same, made a sufficient discovery of gold within the limits of said claim as such discovery is defined to you in these instructions, then your verdict must be for the defendants."

XVI.

The Court erred in giving to the jury instruction number 22 in its general charge, which was in the language following, viz.:

"You are further instructed that all mineral deposits in land of the United States in Alaska are open to exploration and purchase by citizens of the United States, under the regulations prescribed by law. And while under such regulations, in order to make a valid placer mining location in Alaska, it is necessary (1) to make a valid discovery of mineral upon or within the ground to be located, and (2) to mark the boundaries of the property upon the ground so that the same may be readily traced, the order in which these acts are to be done is immaterial, provided they shall have been complied with before the rights of others have intervened.

It is not essential that the discovery shall precede or co-exist with the demarkation of the boundaries. The discovery may be made first, and the marking of the boundaries subsequent, or the marking of the boundaries may be first and the discovery subse-

quent; and when both are effected, they operate to perfect a title as against all the world save those whose rights have intervened.

And in this case, if you find from the evidence that the said U. G. Hastings located the ground in controversy through his agent in January, 1904, and thereafter the said Richard Stafford as successor in interest of the said Hastings made a discovery of gold within the exterior boundaries thereof, but that such discovery of gold was made before the plaintiffs initiated their title, and that at the time of such discovery of gold by Stafford (if you find there was a sufficient discovery by Stafford as defined in these instructions), the boundaries of said claim had been staked and marked by the agent of the said Hastings as to be readily traced at the time of the discovery of gold within the lines thereof by said Stafford, then you are instructed that the fact that the discovery may have occured long subsequent to the marking of the boundaries cannot affect the rights of the defendants, provided you find that the marking by Hastings through his agent and the discovery of gold by Stafford within the limits of the claim, occurred prior to the location by the plaintiff Rooney." (Tr. p. 350.)

XVII.

The Court erred in overruling plaintiffs' motion for a particular judgment.

XVIII.

The Court erred in overruling plaintiffs' motion for a new trial.

XIX.

The Court erred in rendering judgment on the ver-

dict in favor of the defendants and against these plaintiffs.

LOUIS K. PRATT,
R. W. JENNINGS,
Attorneys for Plaintiffs Below and Plaintiffs in Error.

Received a copy of the above and foregoing assignment of errors this 25th day of May, 1911.

JOHN L. McGINN,
Attorney for Defendants Below and Defendants in Error.

[Endorsed]: Filed May 25, 1911.

Writ of Error [Original].

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Honorable, the Judge of the District Court for the Territory and District of Alaska, Fourth Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which in said District Court before you William Rooney, John Junkin, G. W. Johnson, and August Plaschlart, plaintiffs below and plaintiffs in error, and E. T. Barnette, J. C. Ridenour, Henry Cook, John L. McGinn, M. L. Sullivan, Atwell & Riley, a mining copartnership, composed of C. B. Atwell and J. E. Riley, Enstrom Bros., a mining copartnership composed of L. Enstrom and O. Enstrom and August Peterson, defendants below, and defendants in error, a manifest error hath happened to the great damage

of the said plaintiffs in error, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 24th day of June, Nineteen Hundred and Eleven, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, the 25th day of May, Nineteen Hundred and Eleven.

[Seal] C. C. PAGE,
Clerk of the U. S. District Court for the Territory of Alaska, Fourth Division.

By E. M. Stanton,
Deputy.

The foregoing writ is hereby allowed.

PETER D. OVERFIELD,
Judge.

Service of within writ of error and receipt of copy thereof is hereby admitted this 25th day of May, 1911.

JOHN L. McGINN,
Attorney for Defendants in Error.

Citation on Writ of Error [Original].

UNITED STATES OF AMERICA—ss.

The President of the United States of America to E. T. Barnette, J. C. Ridenour, Henry Cook, John L. McGinn, M. L. Sullivan, Atwell & Riley, a Mining Copartnership, Composed of C. B. Atwell and J. E. Riley, Enstrom Bros., a Mining Copartnership Composed of L. Enstrom and O. Enstrom and August Peterson, Defendants Below, and Defendants in Error, or to John L. McGinn, Their Attorney.

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court for the Territory and District of Alaska, of the Fourth Division thereof, wherein William Rooney, John Junken, G. W. Johnson and August Plaschlart, are the plaintiffs in error, and the first-named persons the defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the plaintiffs in error in that behalf.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 25th day of May, 1911, and of the Independence of the United States, the one hundred and thirty-fifth.

PETER D. OVERFIELD,
District Court Judge Presiding in the District Court for the Territory and Dist. of Alaska, 4th Division.

[Seal] Attest: C. C. PAGE,
Clerk of the District Court for the Terr. of Alaska, 4th Division.

By E. M. Stanton,
Deputy.

Service of the above citation by the receipt of a copy thereof is hereby admitted this 25th day of May, 1911.

JOHN L. McGINN,
Attorney for Defendants.

[Caption and Title.]

Order Extending Return Day.

Upon the application of the said plaintiffs in error, by reason of the great distance between Fairbanks, Alaska, and San Francisco, California, the necessary delays in preparing bill of exceptions, and the uncertainties of the transmission of mail between the points above named,—

IT IS ORDERED that the return day of the writ of error be allowed in the above-entitled cause be extended from the 25th day of June, 1911, as heretofore

fixed to the 15th day of August, 1911.

Dated May 25th, 1911.

PETER D. OVERFIELD,
District Judge.

Service of the foregoing Order by the receipt of a copy thereof is hereby admitted this 25th day of May, 1911.

JOHN L. McGINN,
Attorney for Defendants in Error.

Entered in Court Journal No. 11, page 149.

[Caption and Title.]

Designation of Place of Hearing Writ of Error.

Under and by virtue of the Act of Congress of January 11, 1909, the place of hearing the Writ of Error in this cause is hereby fixed at the City of Seattle, in the State of Washington.

DONE in open court, Fairbanks, Alaska, this 7th day of May, 1911.

PETER D. OVERFIELD,
District Judge.

[Endorsed]: Filed June 7, 1911.

[Certificate of Clerk U. S. District Court to Record.]

[Caption and Title.]

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, C. C. Page, Clerk of the District Court of the Territory of Alaska, Fourth Division, hereby certify

that the foregoing and hereto annexed three hundred eighty-six (386) typewritten pages, numbered from 1 to 386, inclusive, constitutes a full, true and correct copy of the record, and the whole thereof, as per the Praecipe of the Plaintiffs in error on file herein, wherein William Rooney, John Junkin, G. W. Johnson, and August Plaschlart are plaintiffs, and E. T. Barnette, J. C. Ridenour, Henry Cook, John L. McGinn, M. L. Sullivan, Atwell & Riley, a mining copartnership, composed of C. B. Atwell and J. E. Riley, Enstrom Bros., a mining copartnership composed of L. Enstrom and O. Enstrom and August Peterson, are defendants, Cause No. 1196, as the same appears of record and on file in my office. I do further certify that the said record is by virtue of the Writ of Error and the Citation issued herein and made a part of this record, and the return in accordance therewith.

I do further certify that accompanying said record, under separate cover, are plaintiffs' original exhibits Nos. 2, 4 and 5, and defendants' original exhibits Nos. "J" and "K," and are made a part of this record in accordance with an order of this Court dated July 4th, 1910, and made a part hereof.

I do further certify that this transcript was prepared by me in my office, and that the cost of examination, preparation and certificate, amounting to One Hundred Forty Dollars and Seventy-five cents ($140.75), has been paid to me by Louis K. Pratt, counsel for plaintiff in error.

In Witness Whereof, I have hereunto set my hand and the seal of said Court, this 9th day of June, 1911.

[Seal] C. C. PAGE,

Clerk, District Court, Territory of Alaska, Fourth Division.

[Endorsed]: No. 2005. United States Circuit Court of Appeals for the Ninth Circuit. William Rooney, John Junkin, G. W. Johnson, and August Plaschlart, Plaintiffs in Error, vs. E. T. Barnette, J. C. Ridenour, Henry Cook, John L. McGinn, M. L. Sullivan, Atwell & Riley, a Mining Copartnership Composed of C. B. Atwell and J. E. Riley, Enstrom Bros., a Mining Copartnership Composed of L. Enstrom and O. Enstrom, and August Peterson, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the Territory of Alaska, Fourth Division.

Filed July 6, 1911.

F. D. MONCKTON,
Clerk.

[PLAINTIFF'S EXHIBIT No. 1.]

278
COOK ET AL
vs.
KLONAS ET AL

PLAINTIFF'S EXHIBIT
No. 1 IN EVIDENCE
Ex X.

CASE No. 2005
U. S. CIRCUIT COURT OF APPEALS,
FOR THE NINTH CIRCUIT
PLAINTIFF'S EXHIBIT No. 1.
Received JUL. 10. 1911.
F. D. MONCKTON. Clerk.

Also
10 1196

In the District Court
Territory of Alaska
4th Third Division

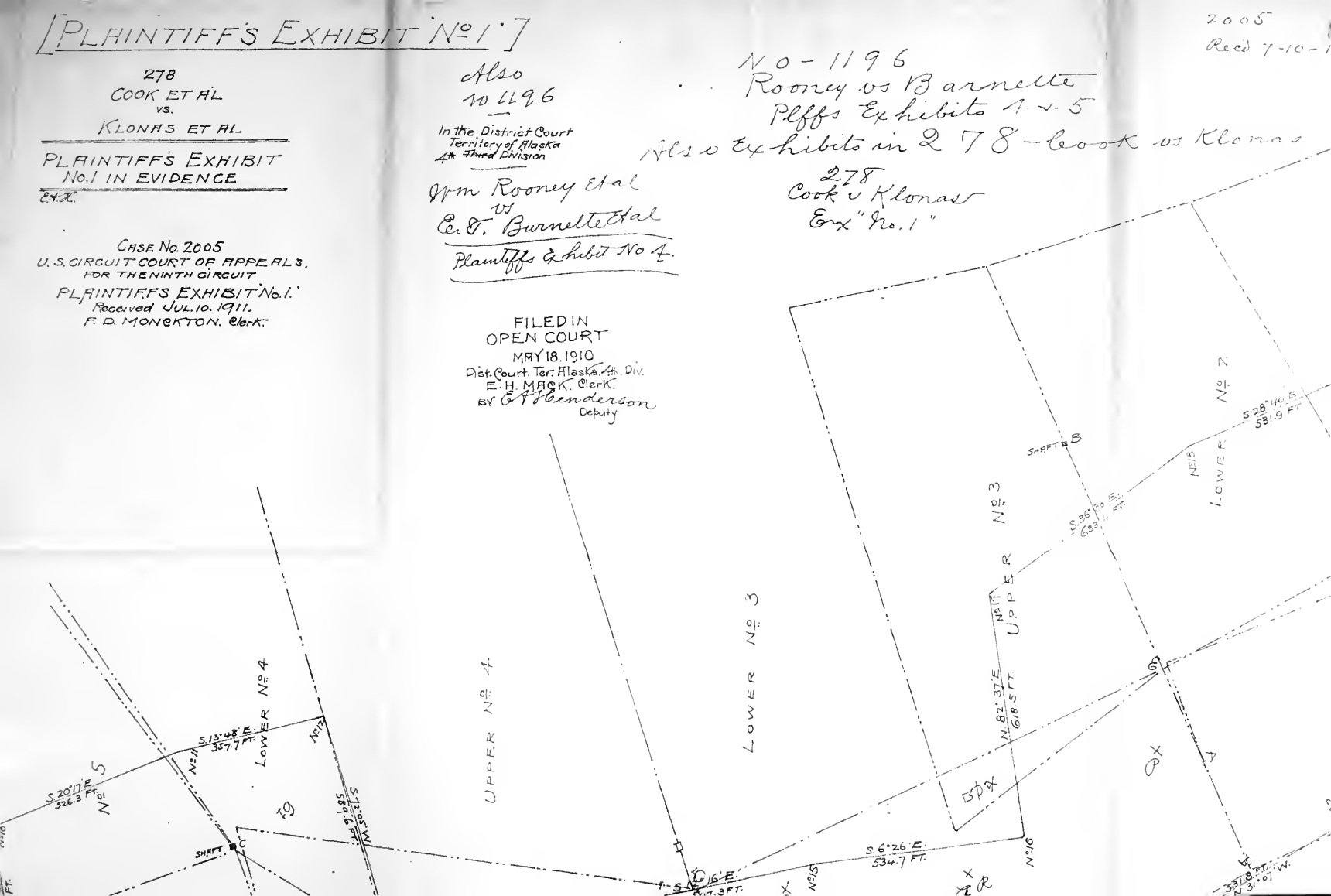
Wm Rooney Et al
vs
Ed. T. Burnette et al
Plaintiffs Exhibit No 4.

FILED IN
OPEN COURT
MAY 18. 1910
Dist. Court. Ter. Alaska. 4th. Div.
E. H. MACK. Clerk.
BY G. H. Henderson
Deputy

No 0-1196
Rooney vs Barnette
Plffs Exhibits 4 & 5
Also Exhibits in 278 - Cook vs Klonas

278
Cook v Klonas
Ex "No. 1"

2005
Rec'd 7-10-1



2005
Rec'd 7-10-11

ernette
its 4 & 5
78 - book of Klonas

Surveyor.


N. 78° 22' E.
492.7 FT.
No. 10
285.9 FT.
N. 72° 05' E
No. 9
No. 8
S. 20° 17' E.
526.3 FT.
No. 5
No. 5
425.7 FT.
N. 14° 54' W.
No. 7
SHAFT
No. 11
S. 13° 48' E.
357.7 FT.
LOWER No. 4
19
No. 12
584.8 FT.
N. 7° 43' W.
S. 72° 05' W.
589.6 FT.
No. 13
No. 6
UPPER No. 4
S. 9° 44' E.
498.6 FT.
No. 4
No. 4
No. 14
660.8 FT.
N. 1° 10' W.
SHAFT No. 2
No. 5
S. 10° 15' E.
547.3 FT.
LOWER No. 3
Gx
No. 15
621.1 FT.
N. 2° 14' W.
S. 6° 26' E.
534.7 FT.
No. 4
Rx
No. 3
Bx
N. 82° 37' E.
618.5 FT.
No. 16
No. 17
UPPER No. 3
S. 36° 18' E.
633.4 FT.
608.3 FT.
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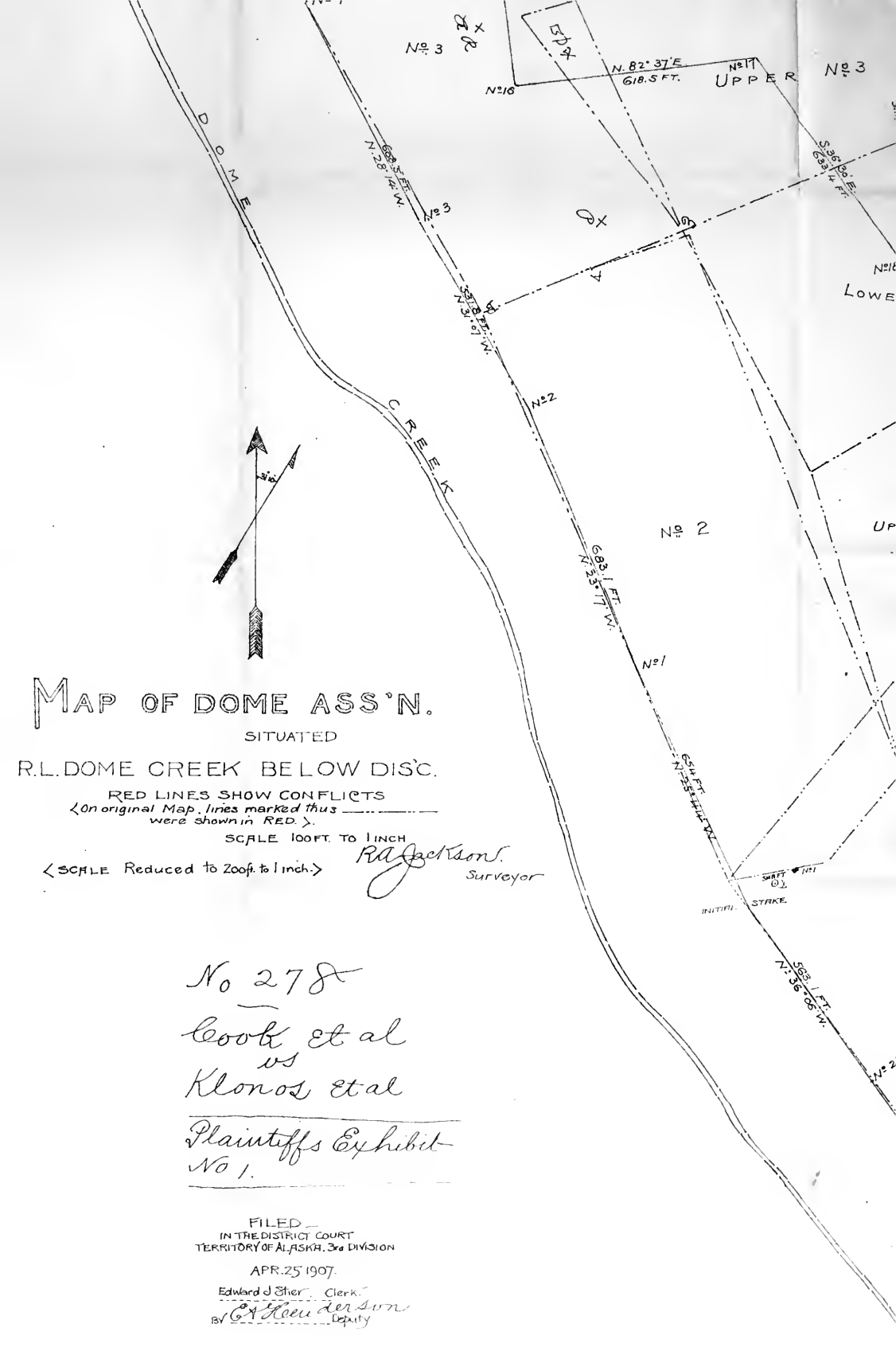
Qx
No. 1
LOWE
538.8 FT.
N. 31° 07' W.
No. 2
DOME



MAP OF DOME ASS'N.

SITUATED

R.L. DOME CREEK BELOW DIS'C.

RED LINES SHOW CONFLICTS
<On original Map. lines marked thus ——.——.—— were shown in RED.>.

SCALE 100 FT. TO 1 INCH

<SCALE Reduced to 200ft. to 1 inch.>

R.A. Jackson
Surveyor

No 278
Cook et al
vs
Klondz et al

Plaintiffs Exhibit
No 1.

FILED
IN THE DISTRICT COURT
TERRITORY OF ALASKA. 3rd DIVISION
APR. 25 1907.
Edward J Stier Clerk.
BY C.A. Henderson Deputy

[PLAINTIFF'S EXHIBIT No 2]

Upper 4 Below Second Tier

Lower 3 Below Second Tier

Upper 3 Below Second Tier

CASE No 2005
U.S CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
PLAINTIFF'S EXHIBIT No. 2
Received JUL. 6 - 1911.
F. D. MONCKTON, Clerk.

No 1196
In The District Court
Territory of Alaska
4th. Third Division.

Wm Rooney Et al
vs
E. F. Burnette
Et al

Plaintiffs Exhibit
No 2

FILED IN
OPEN COURT
DEC 15 1909
Dist. Court. Ter. Alaska. 4th Div.
E. H. MACK, Clerk
BY C.A. Henderson Deputy
also filed again
May 12. 1910
E.H.K.

Lake

North

N.E. Cor.

4 Below 1 tier

400

2440

Tier

No 1196
In The District Court
Territory of Alaska
4th. Third Division.

Wm Rooney Et al
vs
E. F. Burnette
Et al

Plaintiffs Exhibit
No 2

FILED IN
OPEN COURT
DEC 16 1909
Dist. Court Ter. Alaska. 4th Div.
E. H. MACK. Clerk
BY C.T. Henderson Deputy
also filed a.m.
May 12. 1910
C.T.K.

Upper 3 Below Second Tier

Lake

Lower 2 below Second Tier

2240

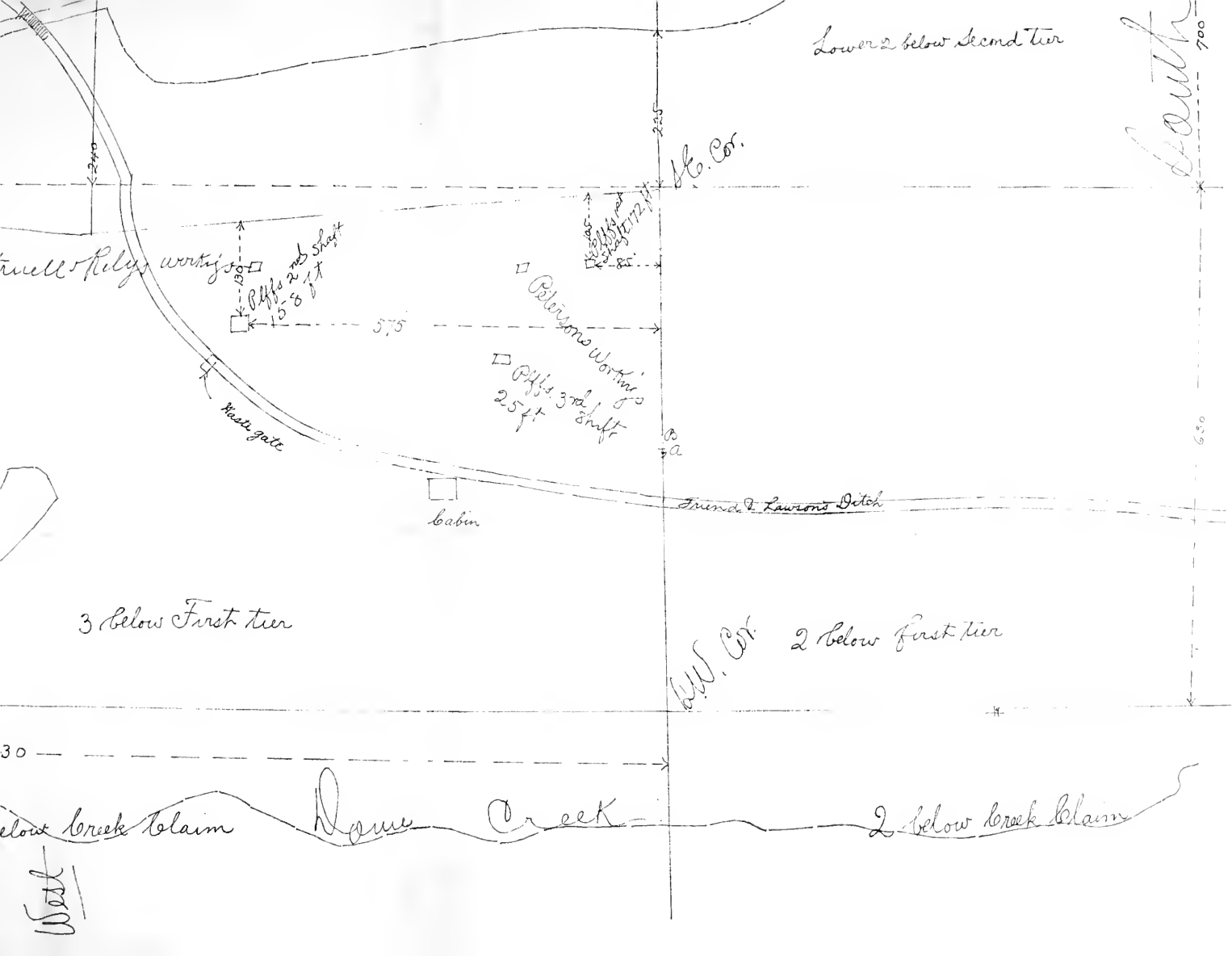
225

Bk. Cor.

□- Atwell Relys workings

2nd Shaft


Mon
No. Cor.
4 Below 1 tier
400
240
225
Eastern Bros Workings
Atwell & Riley's working
130
Piffs 2nd shaft
15'0
1'
5,5
Peterson Workings
Piffs 3rd shaft
25 ft
Waste gate
Cabin
W. Cor.
125
1430
3 Below First tier
3 Below Creek Claim
4 Below Creek Claim
Dome Creek
East


Lower 2 below Second tier
South
700
225
240
N. Cor.
Tunnell & Riley workings
130
Pits 2nd Shaft
15
5
11
5.5
Pits 2nd Shaft
85
17½
Bierons Workings
Pits 3rd Shaft
25 ft
Nash gate
Trinda & Lawrons Ditch
Cabin
3 below First tier
S.W. Cor.
2 below First tier
630
30
below Creek Claim
Agua Creek
2 below Creek Claim
West

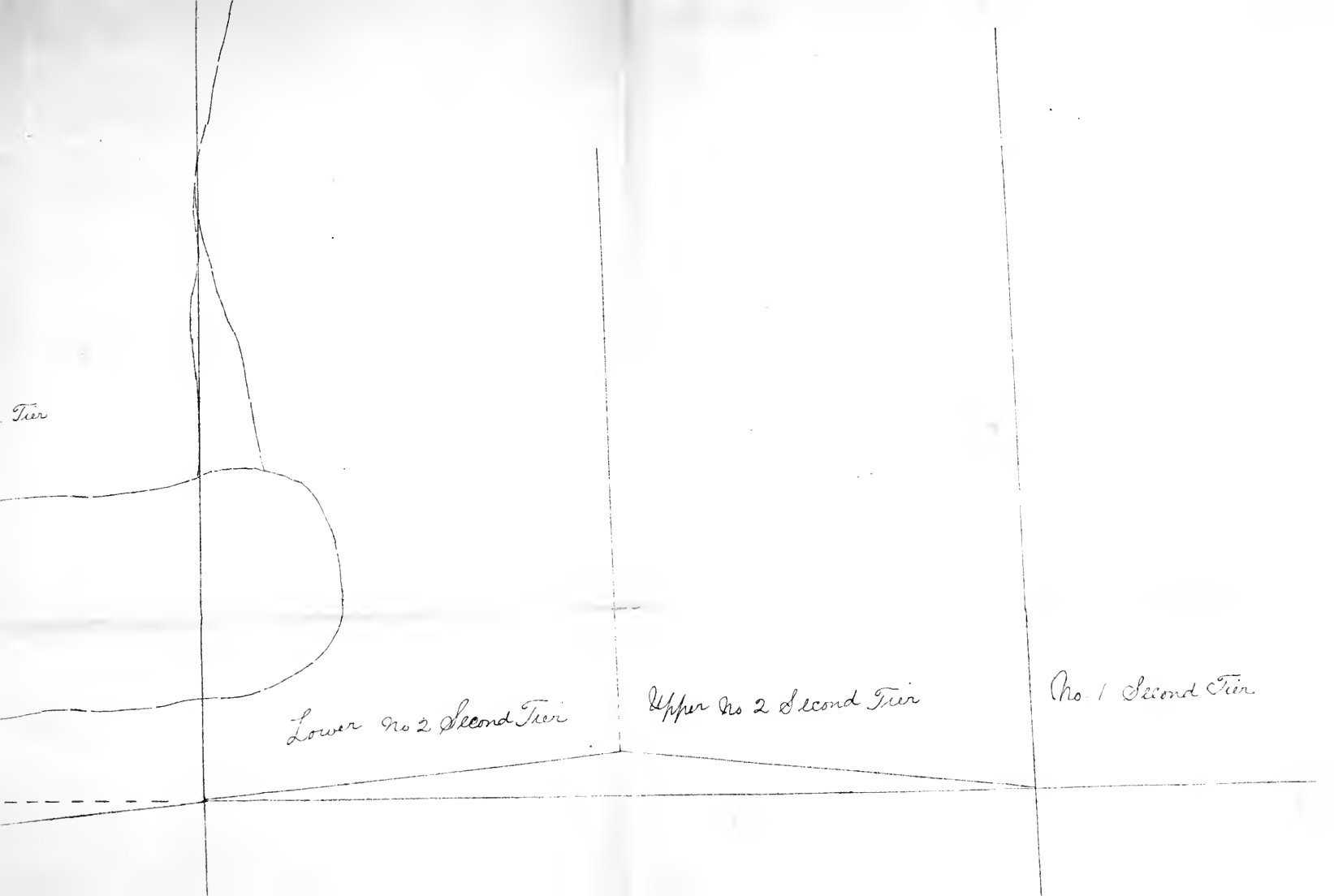
[PLAINTIFF'S EXHIBIT 5]

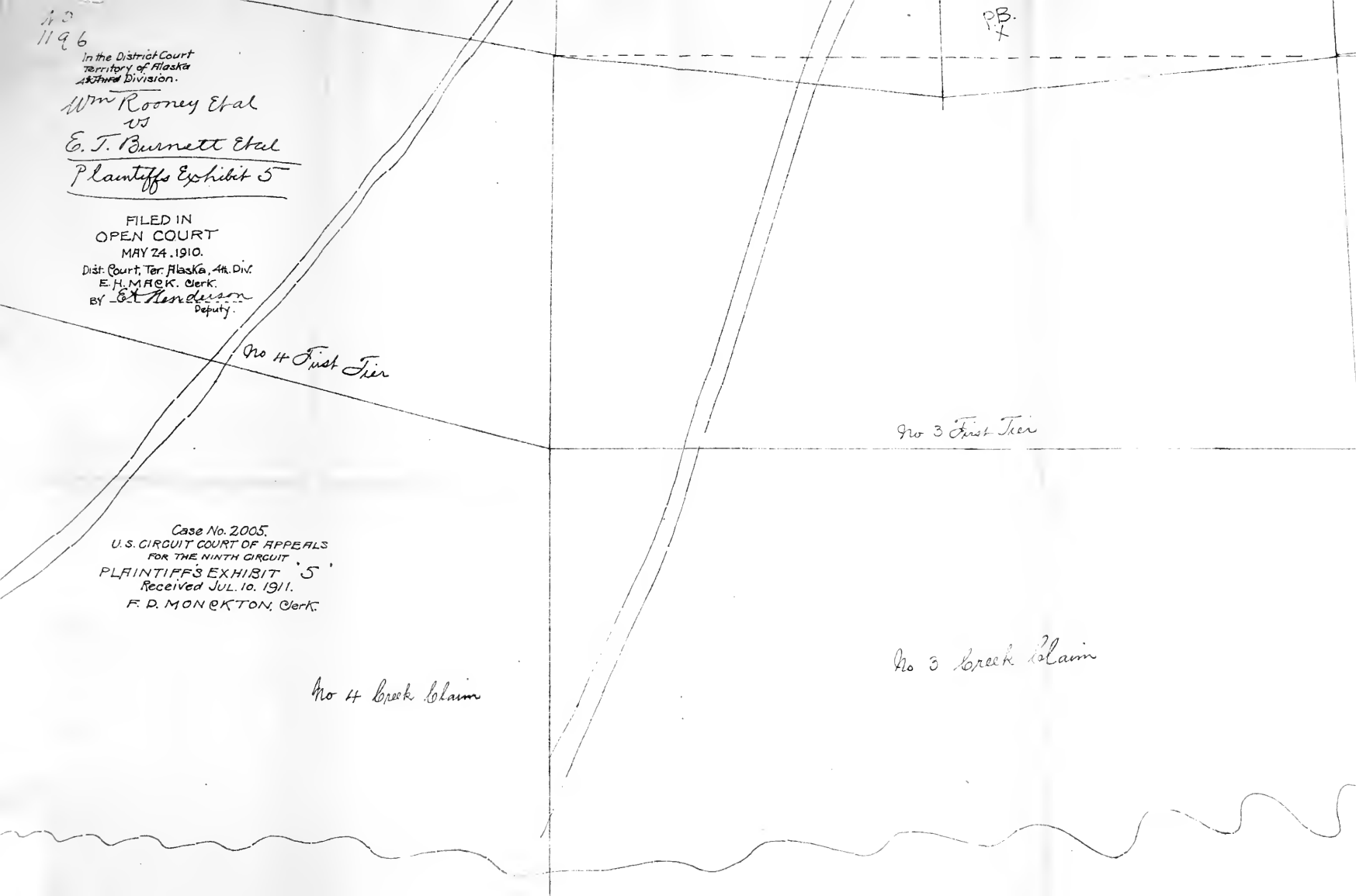
No 3
1196

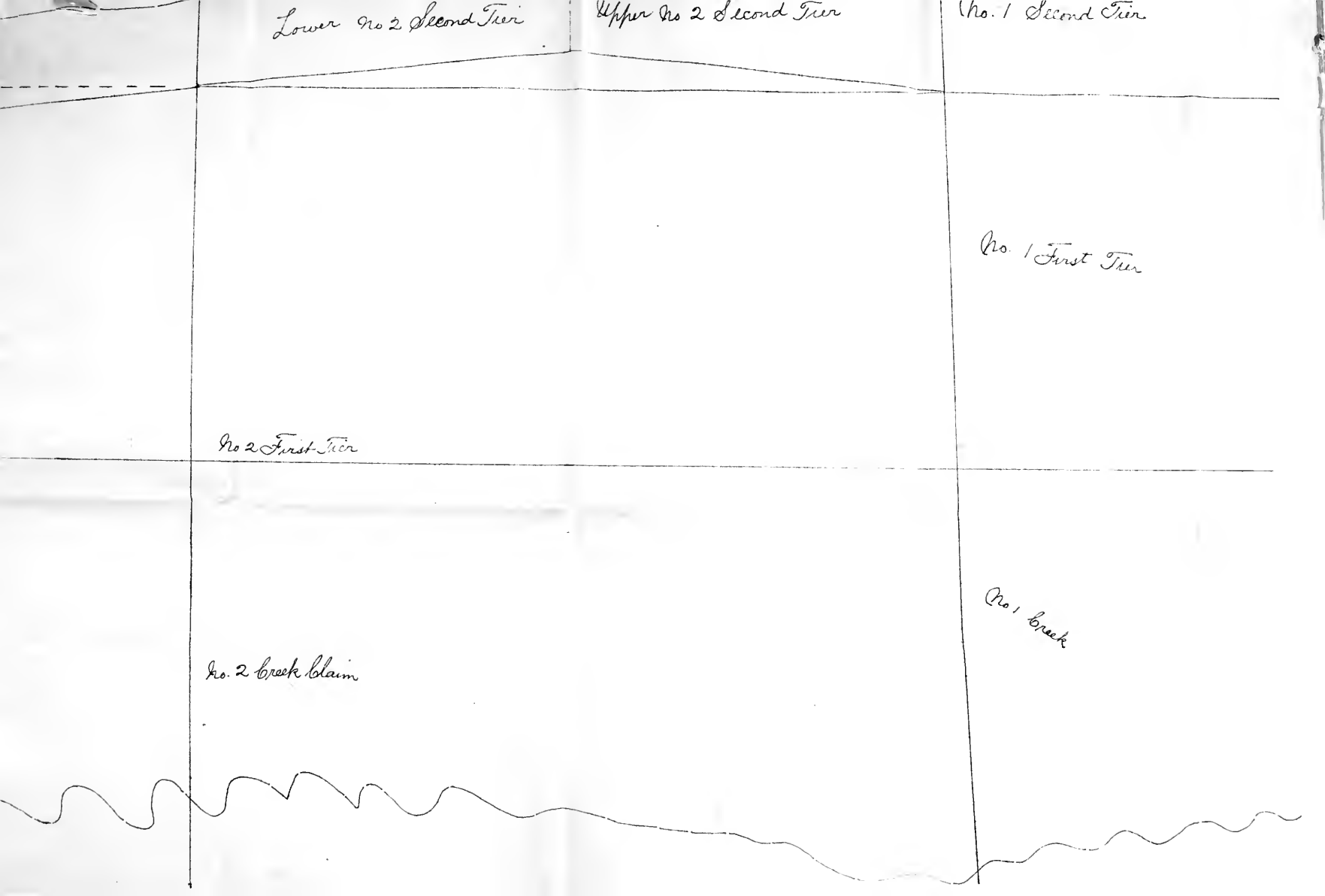
In the District Court
Territory of Alaska
Akthird Division.

Wm Rooney Etal
vs
E. T. Burnett Etal

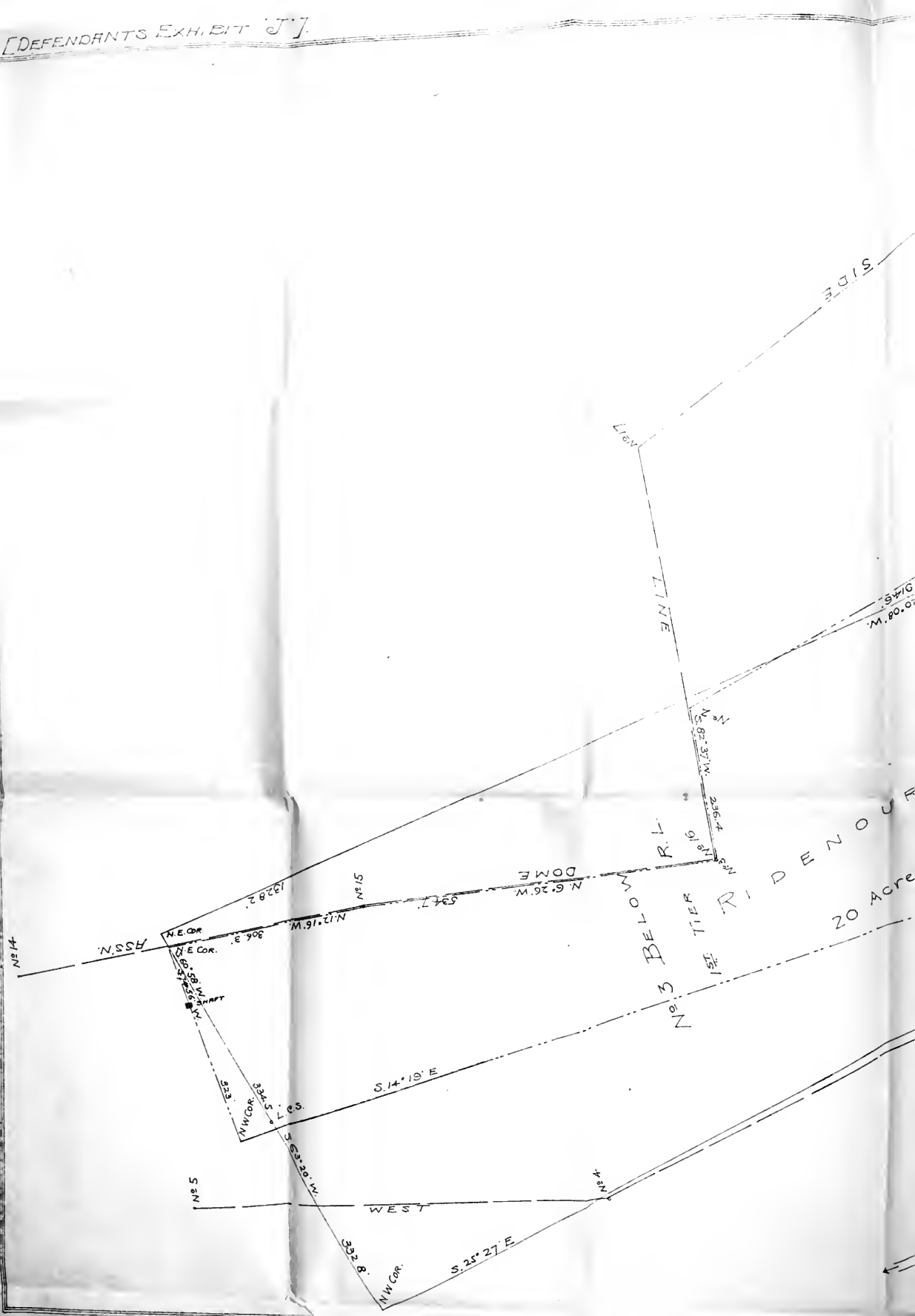
Plaintiffs Exhibit 5


Tier
Lower no 2 Second Tier
Upper no 2 Second Tier
No 1 Second Tier

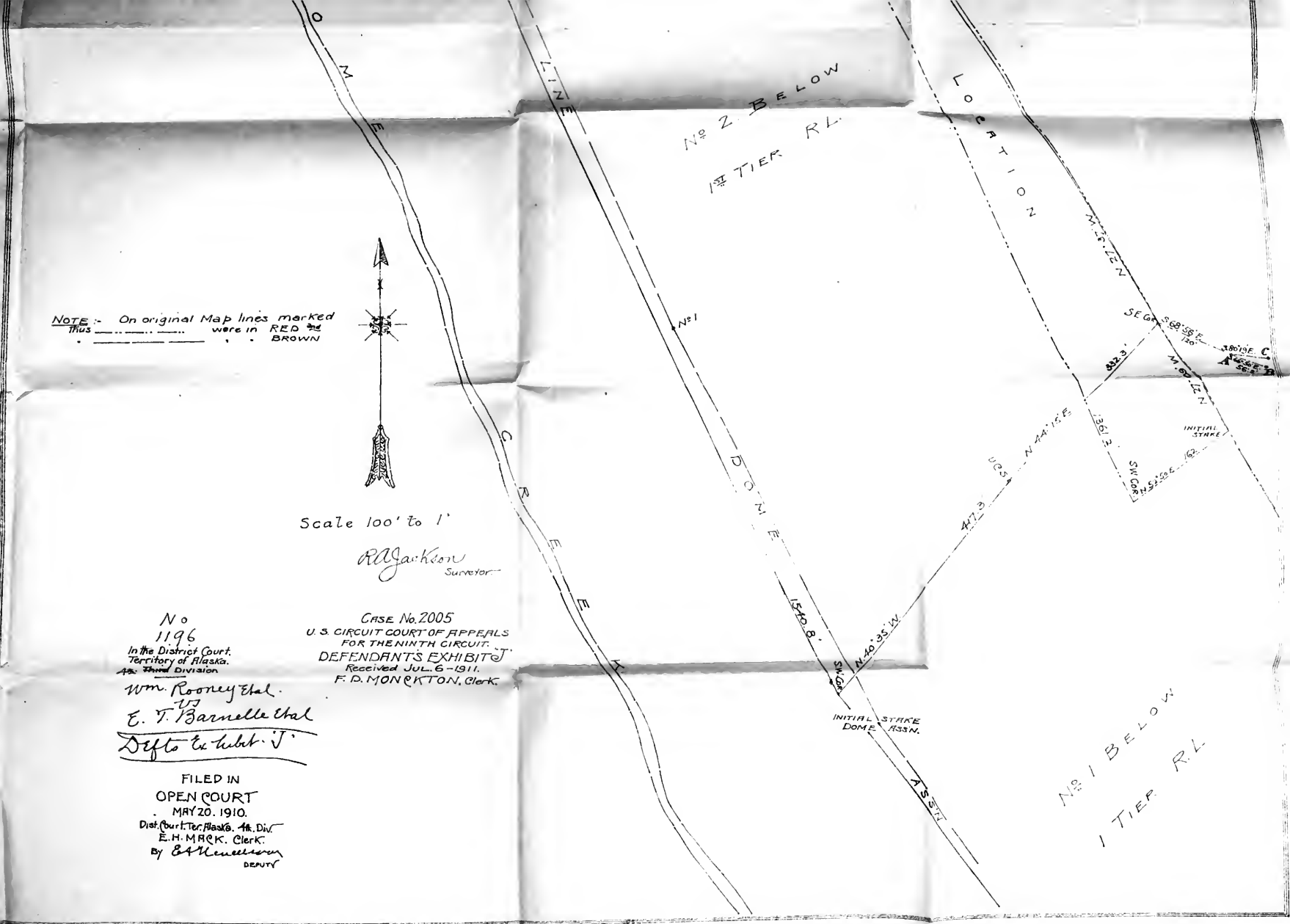

No 4
1196
In the District Court
Territory of Alaska
4th Judicial Division.
Wm Rooney Etal
vs
E. T. Burnett Etal
Plaintiffs Exhibit 5
FILED IN
OPEN COURT
MAY 24. 1910.
Dist. Court, Ter. Alaska, 4th. Div.
E. H. MACK. Clerk.
BY C.K. Henderson
Deputy.
No 4 First Tier
No 3 First Tier
Case No. 2005.
U.S. CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
PLAINTIFF'S EXHIBIT '5'
Received JUL. 10. 1911.
F. D. MONCKTON, Clerk.
No 4 Creek Claim
No 3 Creek Claim


Lower No 2 Second Tier
Upper No 2 Second Tier
No. 1 Second Tier
No. 1 First Tier
No 2 First Tier
No. 1 Creek
No. 2 Creek Claim

[DEFENDANTS EXHIBIT "J"]




N. 6° 26' W.
DOME
No 4
No 3 BELOW
1ST TIER
R. L.
No 16
No 3
236.4
N. 82° 37' W.
No 2
LINE
No 17
RIDENOUR
20 Acres
N. 20° 08' W.
1015.6
SIDE
No 3
1588.4
1259.4
S. 67° E.
No 5
No 6
S. 68° 37' W.
319.4
N. 67° E.
334.8
S. 67° W.
229.4
134
S. 67° E.
S. 22° 05' E.
No 2
No 18
S. 32° 01' E.
1220
EAST
D O



NOTE:- On original Map lines marked Thus ——..——..—— were in RED and . . . . . BROWN

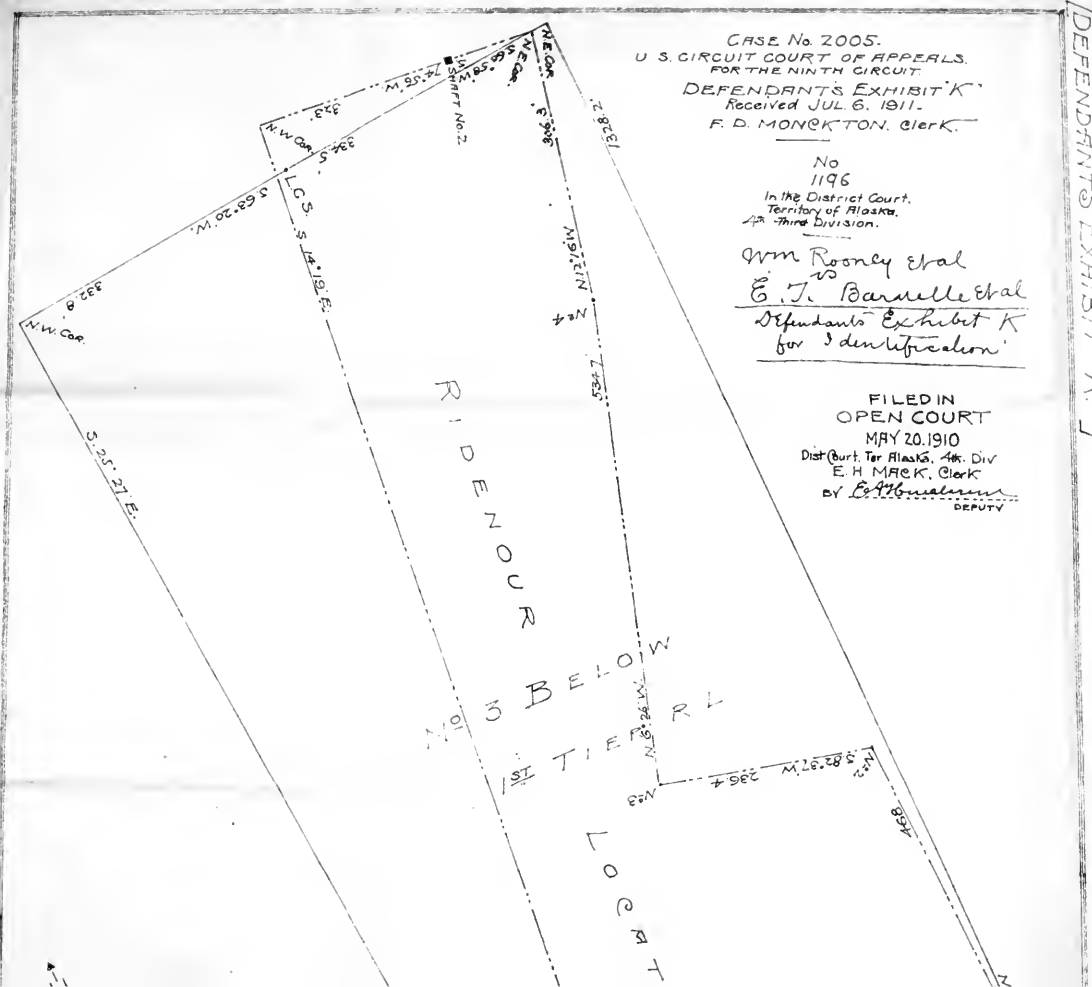
Scale 100' to 1"

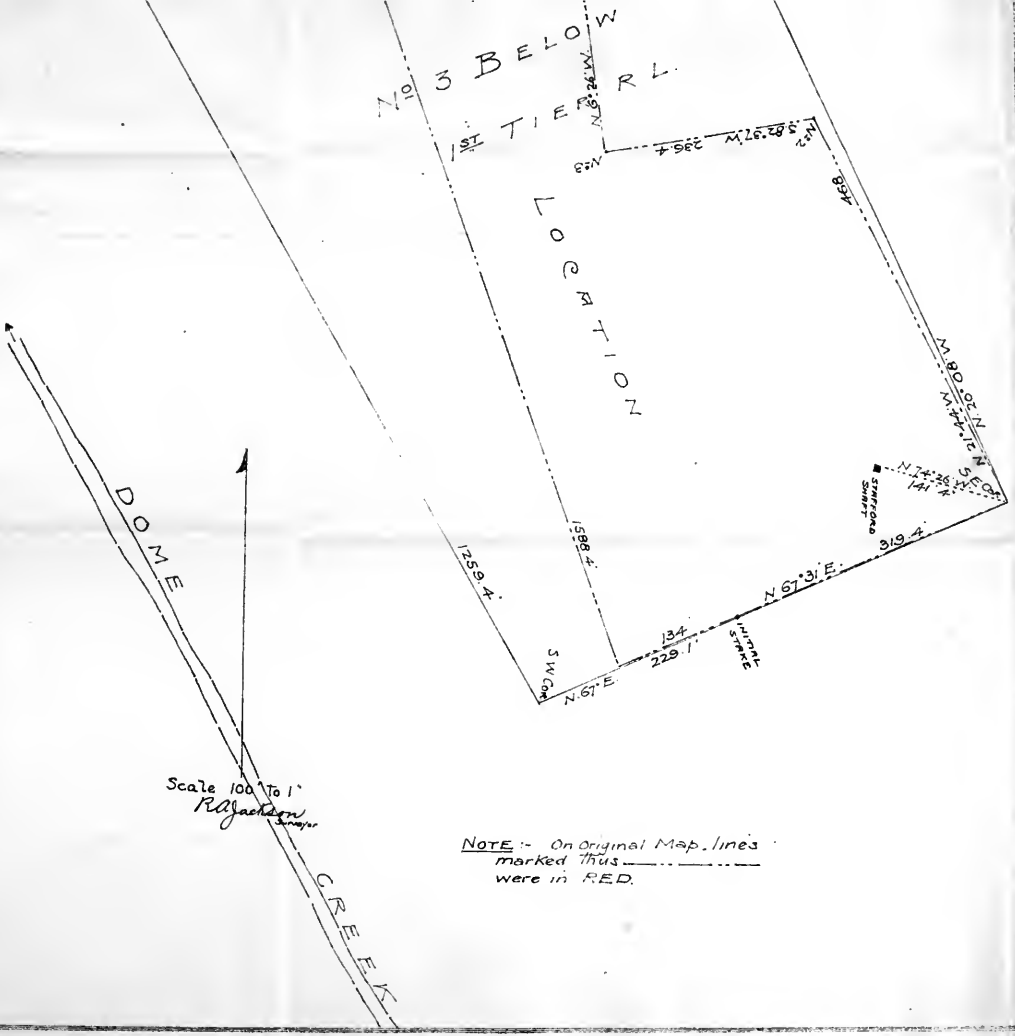
R.A. Jackson
Surveyor

No 1196
In the District Court.
Territory of Alaska.
~~4th~~ Third Division
Wm. Rooney et al.
vs
E. T. Barnelle et al
Defts Exhibit J.

FILED IN
OPEN COURT
MAY 20. 1910.
Dist. Court Ter. Alaska. 4th. Div.
E. H. MACK. Clerk.
By E. H. Mellenson
DEPUTY

CASE No. 2005
U. S. CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.
DEFENDANT'S EXHIBIT J.
Received JUL. 6-1911.
F. D. MONCKTON, Clerk.


CASE No. 2005.
U. S. CIRCUIT COURT OF APPEALS.
FOR THE NINTH CIRCUIT.
DEFENDANT'S EXHIBIT 'K'
Received JUL. 6. 1911.
F. D. MONCKTON, Clerk.
No
1196
In the District Court,
Territory of Alaska,
4th Third Division.
Wm Rooney et al
vs
E. J. Barnelle et al
Defendants Exhibit K
for Identification
FILED IN
OPEN COURT
MAY 20. 1910
Dist Court, Ter Alaska, 4th Div
E. H. MACK, Clerk
BY
DEPUTY
DEFENDANT'S EXHIBIT 'K'
RIDENOUR
No 5 BELOW
1ST TIER
LOCATION
N.E. COR.
N.W. COR.
L.C.S.
S. 14° 15' E.
N. 17° W.
N. 82° 37' W. 236.4
S. 25° 27' E.
S. 63° 20' W.
N. 85° 58' W.
1328.2
534.7
330.8
313.3
834.5
N.1
N.2
N.3
N.4



NOTE :- On original Map. lines marked thus ..... were in R.E.D.

No. 2005

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

WILLIAM ROONEY et al.,

Plaintiffs in Error,

vs.

E. T. BARNETTE et al.,

Defendants in Error.

BRIEF OF PLAINTIFFS IN ERROR.

LOUIS K. PRATT and
ROBERT W. JENNINGS,
Attorneys for Plaintiffs in Error.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2005.

WILLIAM ROONEY et al.,

Plaintiffs in Error,

vs.

E. T. BARNETTE et al.,

Defendants in Error.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

Plaintiffs below are plaintiffs in error. Plaintiffs sued defendants in ejectment to recover possession of Claim No. 3 Below Discovery, 1st Tier, Right Limit, Dome Creek, Fairbanks District, Alaska, together with damages for withholding. The case was tried before the Court and a jury and resulted in a verdict and judgment for defendants. Prior to verdict the case had been dismissed as against all the defendants except Cook, Ridenour, Barnette, McGinn and Sullivan. (Printed Record, 333.)

It may conduce to a better understanding of the case to state:

(1) In January, 1904, Woodward located (?) the claim in controversy for Hastings. In September, 1904, Hastings gave to Stafford an option to purchase. This option was not recorded.

(2) In March, 1905, Cook, Ridenour, Armstrong, Newton, Sumner, Armstrong, Selkirk and Armstrong located (?) the Dome Group Association Claim of 160 acres, *embracing this claim.*

(3) In April, 1905, the said locators of said Dome Group Association claim began a suit against several defendants, including Stafford, to clear their title to said 160 acre claim. That suit was No. 278, files of the District Court of Alaska, 3d (now 4th) Division. It resulted in a nonsuit. Plaintiffs therein appealed. The case then became No. 1510, files of this court, entitled Cook vs. Klonos. On October 5, 1908, your Honors handed down a decision sustaining the Court below in granting the nonsuit; on the ground, however, that the location of said Association Claim of 160 acres, appeared to be but a fraudulent device by which, contrary to statute, one E. T. Barnette was to acquire more than 20 acres by one location. (Cook vs. Klonos, 164 Fed. 529.) On March 2, 1909, your Honors modified the judgment in said case saying: "But a further examination of the record does not satisfy us that Cook and Ridenour were parties to the fraud. If they were not, and they joined in the location in question in good faith and the ground was open to location, we think they are entitled to select 20 acres each within the exterior boundaries of the associated claim, provided they have continued to conform to the requirements of the statute and the local rules of the mining district. We accordingly modify our judgment so as to read, 'The judgment of the court below is affirmed as to appellants A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk, and A. R. Armstrong and as to Henry Cook and J. C. Ridenour it is reversed, and the case remanded, with leave to them to file a supplemental bill, should they

so elect, and in that event for further proceedings in accordance with the views here expressed.' " (Cook vs. Klonos, 168 Fed. 700.)

(4) On September 21, 1905, William Rooney and associates, plaintiffs herein, staked and marked the claim in controversy here, went into possession thereof, prospected and worked same continuously, and about Christmas of 1905 found gold in paying quantities, and were in possession, working and claiming ownership as against all but the United States.

(5) After Rooney discovered gold and shortly before this Court's decision of Cook vs. Klonos, Barnette, Cook, Ridenour, McGinn and Sullivan acquired the Stafford title (?), and, ignoring the claims of Rooney and associates, did, through lessees, mine out the ground. Hence this action.

THE PLEADINGS.

THE COMPLAINT AND SUPPLEMENTAL COMPLAINT (P. R. 2, 5) contain the usual averments in ejectment, viz., ownership and right of possession in plaintiffs, ouster by defendants, damages of plaintiffs and prayer for recovery of possession and for damages.

THE AMENDED ANSWER (P. R. 7) contains: (1) General Denial; (2) plea that the premises claimed are a part of the Dome Group owned by Cook, Ridenour, Armstrong, Sumner, Newton, Armstrong, Selkirk, Armstrong, McGinn and Sullivan, who "now are and for a long time prior to the commencement of this suit have been in possession and entitled to the possession, etc."; (3) plea that the

premises claimed are owned by Barnette, Cook, Ridenour, McGinn and Sullivan, who "are now and for a long time prior to the commencement of this suit have been in possession and entitled, etc."; (4) plea that the premises claimed are owned by J. C. Ridenour, who is "now and for a long time has been in possession and entitled, etc."; (5) an allegation in mitigation of damages.

AMENDED REPLY (P. R. 22) contains: (1) General denial; (2) allegation of facts showing the invalidity of the Dome Group Association claim on account of "dummy locators."

THE EVIDENCE.

FOR PLAINTIFFS (P. R. 63–65): Plaintiffs proved the staking and marking by them on September 21, 1905, their going into possession, their continuity of possession, their prospecting and work upon the claim, their discovery of gold thereon, their ouster by defendants' lessees, the amount of royalty or rent (to wit $67,610) received by defendants out of the gold extracted by said lessees; also the total amount of gold so extracted. Plaintiffs, deeming it advisable to show, also, in their case in chief, the invalidity of the Dome Group Association Claim, proceeded as follows:

In said cause No. 278, at the instance of defendants therein, the depositions of said E. T. Barnette, Henry Cook and J. C. Ridenour had been taken. Plaintiffs herein, at the trial hereof, read from that deposition of said Barnette (P. R. 67 et seq.), and from that of Cook (P. R. 95 et seq.) and from that of Ridenour (P. R. 115 et seq.); also, at the trial of said

cause No. 278, plaintiffs therein brought forward as witnesses said Barnette and said Ridenour, who gave oral testimony. At the trial hereof, plaintiffs herein read from said testimony of said Barnette (P. R. 136 et seq.) and from that of Ridenour (P. R. 125 et seq.).

FOR DEFENDANTS: (1) On the general denial in the Amended Answer there was no evidence; (2) on the first affirmative defense (Dome Group) there was evidence that the Dome Group Association claim was located in March, 1905, by Cook, Ridenour, Armstrong, Newton, Sumner, Armstrong, Selkirk and Armstrong; Cook and Ridenour denied that they were parties to, or knew of, any fraudulent arrangement between Barnette and the other six locators named; (3) on the second affirmative defense (the Stafford title) there was evidence that in January, 1904, Woodward staked the claim (No. 3) for and in the name of Hastings; there was evidence that on September 8, 1905, Hastings conveyed (?) to Stafford; that Stafford discovered gold (?) in September, 1904, and in July, 1905; that whatever title Stafford acquired is now vested in defendants; (4) on the third affirmative defense (Ridenour title) there was evidence introduced, but, as this defense was entirely withdrawn from the jury (P. R. 324 bottom; 325 bottom, 326 top, 340), none of said evidence need be here adverted to; (5) on the question of good faith of defendants there was evidence, but, as the question is not an issue on this appeal, it need not be here adverted to.

MOTIONS.

At the conclusion of all the evidence plaintiffs moved the Court for a directed verdict (P. R. 319); denied (P. R. 320), exception (P. R. 320); plaintiffs moved that the first affirmative defense (Dome Group Association Claim) be withdrawn (P. R. 319); denied, exception (P. R. 320); plaintiffs moved that the second affirmative defense (Stafford title) be withdrawn (P. R. 319); denied, exception (P. R. 320); plaintiffs moved that the third affirmative defense (Ridenour title) be withdrawn (P. R. 320); granted (P. R. 324).

ASSIGNMENT OF ERRORS.

I.

The Court erred in overruling the challenge for cause interposed by plaintiffs in the trial court to the juror Derby.

II.

The Court erred in overruling the objection of plaintiffs below to the introduction in evidence by defendants of Exhibit "H," which was a deed dated December 15, 1909, from R. C. Wood to the defendants.

III.

The Court erred in refusing the request of plaintiffs below for a directed verdict made at the close of all the evidence.

IV.

The Court erred in refusing to instruct the jury not to consider the first affirmative defense, to wit, the alleged Dome Group location.

V.

The Court erred in refusing to instruct the jury not to consider the second affirmative defense, to wit, the so-called Stafford claim.

VI.

The Court erred in refusing to give and read to the jury special instruction number 8 tendered by the plaintiffs below as follows:

"Defendants contend and there is evidence to prove that prior to the 23d day of December, 1905 (the date of Rooney's discovery), an association of eight persons consisting of A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk, A. E. Armstrong, Henry Cook and J. C. Ridenour, calling themselves the Dome Group Association, had discovered gold on the 160 acres embracing the claim in dispute and had properly marked said 160 acres on the ground so that the boundaries could be readily traced. Plaintiffs admit the discovery of gold, this staking and marking in the *name* of said eight persons, but they say that such location was not a valid one for the reason that, although it was made in the *name* of eight persons, yet it was not really done by or for said eight persons in good faith, but was in reality a scheme on the part of E. T. Barnette by which said E. T. Barnette was to acquire more than 20 acres of mining ground for himself in one location, in violation of the law which declares that no location shall include more than 20 acres for any individual claimant.

If you find from the evidence that this was the case, then the location by the Dome Group Associa-

tion was fraudulent and null and void and could and did confer no rights of any kind upon any of the said eight persons nor upon McGinn and Sullivan so far as they claim under said Association."

VII.

The Court erred in refusing to instruct the jury as requested by plaintiffs below in their special instruction number 9; which is in the following language:

"Plaintiffs contend and have offered evidence to prove that before the location or attempted location in the name of said eight persons was made said E. T. Barnette had written to A. T. Armstrong for powers of attorney from him and others authorizing him, Barnette, to locate, enter and take up mining claims and other lands in Alaska and to do all that is necessary to be done to acquire the right and title to any such mining claims or land as may be taken up, entered or located, and that in the letter from Barnette to Armstrong he stated that he would expect half, and that in reply he received the powers of attorney without qualifications or restrictions.

If you find from the evidence that this is true, you are instructed that such transactions would constitute in law a contract, agreement or understanding between said E. T. Barnette, and said persons by which said Barnette was to take up or to have taken up mining claims in the names of said persons and that one-half of all he should take up or have taken up should be his."

VIII.

The Court erred in refusing to read to the jury

as part of his instructions special instruction prepared by plaintiffs below and marked number 10, which was as follows:

"Plaintiffs further contend and have offered evidence to prove that Barnette being in possession of these powers of attorney, entered into an arrangement with defendants Cook and Ridenour by which Cook and Ridenour were to do the actual work of making a discovery upon and of staking and marking the boundaries of an 160 acre tract and he was to furnish the supplies, tools, boiler, etc., necessary for the accomplishment of that purpose, and that they should take up said 160 acre tract in the names of A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk, A. R. Armstrong, Henry Cook and J. C. Ridenour, and that in pursuance of that arrangement the location or attempted location of the Dome Group Association was made. If you find from the evidence that this is true, then Barnette was the principal locator of the Dome Group Association of 160 acres, although he was not a locator by name, and by the use of the names of his friends or relatives has located for his own benefit a greater area of mining ground than that allowed by law. This is what the statute prohibits. The statute says, 'No such location shall be made.' "

IX.

The Court erred in failing to give and read to the jury the special instruction of plaintiffs below marked number 11, which reads as follows:

"It would be immaterial in this case whether or not Henry Cook and J. C. Ridenour, McGinn and

Sullivan, or either of them, knew of this arrangement between Barnette and the absent locators, either at the time of the location of the Dome Group or at any other time, and it would be immaterial whether Cook and Ridenour first proposed to Barnette to locate or whether Barnette first proposed to Cook and Ridenour to locate. And it would be immaterial whether they or either of them knew what interest Barnette was to get or whether Barnette has in fact gotten the interest, and it would be immaterial whether Cook or Ridenour were to get only an eighth apiece. The question is, 'Did the location include more than 20 acres for any individual claimant, whether that claimant be a locator by notice on the ground or of record, or not.'

If it did, then the location or attempted location by the Dome Group was invalid, and Rooney had a perfect right to locate the property so far as the Dome Group location is concerned."

X.

The Court erred in refusing to instruct the jury as requested in plaintiffs' instruction number 13, which reads as follows:

"The Court instructs the jury that the life of a mining title to placer ground commences at the date of the discovery of gold within lines plainly marked on the ground so that they can be readily traced.

The defendants in their second affirmative defense in the amended answer claim title to the ground in controversy by mesne conveyance based on an alleged location January 2, 1904, by one U. G. Hastings. The plaintiffs contend that the boundaries of the

said claim were not marked on the ground so as to be readily traceable or at all, by the said Hastings or by any other person for him, at the said date or at any time prior to Rooney's Discovery, December 23d, 1905, and that no discovery of gold was made thereon by said Hastings or by any other person for him, at any time. If you find from the evidence that either of these contentions is true, then Hastings never had any mining title to said ground and could convey none to Stafford.

The defendants claim that the said ground was properly staked and marked on the ground January 2, 1904, by one William Woodward as agent for Hastings, and that a location notice of the claim was recorded at the proper time and place; they further show by evidence that on September 8th, 1905, the said Hastings made a quitclaim deed of his claim to the ground to one Richard Stafford, who on September 23d, 1905, quitclaimed a three-fourths interest therein to Miller, De Journal and Crawford and through these four persons, by mesne conveyances, they deraign title to said ground based on the Hastings staking.

Upon this last phase of the case as advanced by the defendants, I charge you that if you find from the evidence that up to September 8th, 1905 (the date of the deed from Hastings to Stafford), no discovery of gold had been made within the boundaries of the said claim, either by Hastings or anyone for him, then Hastings had no mining title to said ground which he could convey to said Stafford, even if the lines were plainly marked, and in this condi-

tion of things the defendants could not and did not secure any title to said ground from that source. To initiate a mining title, the discovery of gold on the ground must be made, either by the locator in person, or by some other person for him at his instance, direct or indirect, and must be made for the purpose of fixing a mining title in the locator to the ground sought to be appropriated."

XI.

The Court erred in refusing to instruct the jury as requested in instruction number 19 tendered by the plaintiffs, which reads as follows:

"It is immaterial, so far as the rights of the parties are concerned, whether the tent of Cook and Ridenour was on number 3 or number 4."

XII.

The Court erred in reading to the jury that part of its general charge designated therein as number 4, in the following language:

"Before you can find a verdict for the plaintiffs you must find by a preponderance of the evidence that at the time they entered upon the premises in controversy and claim to have located the same as a placer mining claim, that the same was unoccupied, unappropriated public domain of the United States." (Tr. p. 336.)

XIII.

The Court erred in that part of its instructions numbers 5 and 6 therein, which read as follows:

"THE DOME GROUP ASSOCIATION.

No. 5: The first affirmative defense under which the defendants claim title to the ground in contro-

versy is made under and by virtue of what is known and styled in the answer as the Dome Group Association claim, which it is conceded includes the property in controversy.

You are instructed that the undisputed evidence shows that at the time of the entry of the plaintiffs upon the ground in controversy, the Dome Group Association claim had been located and a discovery of gold had been made within the limits of that claim; but the plaintiffs contend that the Dome Group Association claim is void, for the reason, as claimed by the plaintiffs, that the locators of said association claim had agreed among themselves prior to the location thereof, that one E. T. Barnette was to be the owner of and entitled to the possession of an undivided one-third of said associated placer claim.

You are instructed that sections 2330 and 2331 of the Revised Statutes of the United States provide as follows:

Sec. 2330. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any *bona fide* pre-emption or homestead claim upon agri-

cultural lands, or authorize the sale of the improvements of any *bona fide* settler to any purchaser.

Sec. 2331. Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required; and all placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes.

You are further instructed that if any arrangement or understanding was had between E. T. Barnette and the other locators of the Dome Group Association claim whereby the said Barnette was to acquire an interest in said association claim in excess of twenty acres, provided such understanding or agreement was entered into before the location of said association claim, would render the said association claim void as to the said Barnette and all the other locators who participated in the understanding or agreement whereby said Barnette was to acquire such interest in said association claim, and said claim would be also void as to all of the locators who had

knowledge that said Barnette was to acquire greater interest in said association claim at or prior to the consummation of said Dome Group Location.

But you are instructed that in order that such an agreement may avoid the Dome Group Association location, you must find that such agreement was entered into prior to the consummation of the location of Dome Group Association; for after such association was located according to law, if you find it was located according to law—that is, by the marking of the boundaries so that same could be readily traced and the discovery of gold within the exterior boundaries sufficient in law as you will be hereinafter instructed, whatever agreement might take place between the locators or between the locators and any other person or persons after the consummation of such association location, cannot affect the validity of such location provided the same was valid when located. In other words, an association location may be avoided by any agreement whereby one of the locators or other person or persons is to acquire an interest therein greater than twenty acres, provided such agreement is entered into prior to the consummation of the location. Any agreement between the locators or between any of the locators and others subsequent to a legal location cannot affect the validity of such association location."

(Number 6.)

"You are further instructed that if any of the locators of the Dome Group Association entered into any agreement or any understanding with E. T. Barnette whereby the said Barnette was to acquire or

become the owner of a greater interest in said association claim than twenty acres, then said location is void as to all who participated in such agreement or understanding, and as to all of such locators who had knowledge of such agreement or understanding prior to said location."

XIV.

The Court erred in its general charge in instruction therein designated as number 7, which is in the following language:

"You are further instructed that if you find that said Dome Group Association is rendered void by any such agreement as to certain of the locators and not as to the others, then such locators as did not participate in such understanding or agreement (if you find there was any such understanding or agreement) would be entitled to select twenty (20) acres apiece from the area included within the exterior boundaries of said Dome Group Association claim, provided such selection were made according to law.

But you are instructed that the attempted selection made by J. C. Ridenour not having been made according to law, you are therefore not to consider the third affirmative defense of the defendants, that is, that said J. C. Ridenour is the owner of the property in controversy by reason of such selection. And since no valid selection has been made by any of the Dome Group locators, you are not authorized to find a verdict in favor of the defendants by reason of the Dome Group Association location, if you find from the evidence that there was any agreement or understanding between any of the locators and E. T.

Barnette that said Barnette should own more than twenty acres of said Dome Group Association claim, provided that such agreement or understanding were made or entered into prior to the consummation of said association location."

XV.

The Court erred in giving and reading to the jury as a part of its general charge instruction therein numbered 9, which reads as follows:

"THE HASTINGS-STAFFORD TITLE.

The second affirmative defense under which the defendants claim title to the ground in controversy is the Stafford and Hastings title.

The defendants claim that one U. G. Hastings, by and through his agent entered upon the premises in controversy in January, 1904, and marked the boundaries of said claim so that the same could be readily traced; that one Richard Stafford thereafter purchased the interest of the said Hastings and made a discovery of gold within the limits of such claim such as would justify a reasonably prudent man not necessarily a skilled miner in prosecuting further work and labor on said claim with the reasonable expectation of developing a paying mine.

You are instructed that if you find from the evidence that the said Hastings through his agent did so mark the boundaries of said claim that the boundaries thereof could be readily traced, and that thereafter the said Hastings conveyed the said parcel of ground to the said Richard Stafford, and that the said Stafford thereafter and before the plaintiff William Rooney entered upon the property for the

purpose of staking the same, made a sufficient discovery of gold within the limits of said claim as such discovery is defined to you in these instructions, then your verdict must be for the defendants."

XVI.

The Court erred in giving to the jury instruction number 22 in its general charge, which was in the language following, viz.:

"You are further instructed that all mineral deposits in land of the United States in Alaska are open to exploration and purchase by citizens of the United States, under the regulations prescribed by law. And while under such regulations, in order to make a valid placer mining location in Alaska, it is necessary (1) to make a valid discovery of mineral upon or within the ground to be located, and (2) to mark the boundaries of the property upon the ground so that the same may be readily traced, the order in which these acts are to be done is immaterial, provided they shall have been complied with before the rights of others have intervened.

It is not essential that the discovery shall precede or co-exist with the demarkation of the boundaries. The discovery may be made first, and the marking of the boundaries subsequent, or the marking of the boundaries may be first and the discovery subsequent; and when both are effected, they operate to perfect a title as against all the world save those whose rights have intervened.

And in this case, if you find from the evidence that the said U. G. Hastings located the ground in controversy through his agent in January, 1904, and

thereafter the said Richard Stafford as successor in interest of the said Hastings made a discovery of gold within the exterior boundaries thereof, but that such discovery of gold was made before the plaintiffs initiated their title, and that at the time of such discovery of gold by Stafford (if you find there was a sufficient discovery by Stafford as defined in these instructions), the boundaries of said claim had been staked and marked by the agent of the said Hastings as to be readily traced at the time of the discovery of gold within the lines thereof by said Stafford, then you are instructed that the fact that the discovery may have occurred long subsequent to the marking of the boundaries cannot affect the rights of the defendants, provided you find that the marking by Hastings through his agent and the discovery of gold by Stafford within the limits of the claim, occurred prior to the location by the plaintiff Rooney." (Tr. p. 350.)

XVII.

The Court erred in overruling plaintiffs' motion for a particular judgment.

XVIII.

The Court erred in overruling plaintiffs' motion for a new trial.

XIX.

The Court erred in rendering judgment on the verdict in favor of the defendants and against these plaintiffs.

DISCUSSION OF ERRORS ASSIGNED.

ERRORS NOS. IV AND XIV.

The first affirmative defense, to wit, the Dome Group Association Claim location, should have been withdrawn from the jury.

The depositions and testimony of Barnette, Ridenour and Cook, read at the trial hereof, as to the "dummy" character of this location, were in no wise contradicted or modified by any evidence in the case. It is true that Cook and Ridenour denied that they knew of or participated in the fraudulent arrangement, but it is submitted that the only potency such denials could have (even if given full credit) would be to establish the right of Cook and Ridenour to select Claim No. 3 under the power of selection mentioned in the modified opinion of this Court in Cook vs. Klonos, heretofore referred to; but Ridenour never brought himself within the terms of that modified opinion, and all evidence as to any selection made by him was withdrawn (P. R. 340), and, as for Cook, there never was any claim that he had made a selection.

The depositions and testimony referred to are the identical depositions and testimony which were before this Court on the appeal of No. 278 on which this Court declared said location to be fraudulent and void (Cook vs. Klonos, *supra*); they conclusively establish the fraudulent character of the location.

It is indeed difficult to reconcile Instruction No. VII (P. R. 340) with the refusal of the trial court to withdraw this defense.

The Court, in that instruction (P. R. 341 top), says: "*And since no valid selection has been made by any of the Dome Group locators, you are not authorized to find a verdict in favor of defendants, by reason of the Dome Group location, if* you find from the evidence that there was any agreement or understanding between *any* of the locators and E. T. Barnette that said Barnette should own more than twenty acres of said Dome Group Association claim, *provided* that such agreement or understanding was made or entered into prior to the consummation of said association location." The Court, by the addition of the "if, etc.," and by the addition of the "provided, etc.," submits to the jury the determination of a fact as to which the evidence was all one way. Plaintiffs excepted to this instruction on that ground (P. R. 358), and the giving of the instruction is assigned as Error No. XIV (P. R. 377).

ERROR NO. V.

Refusing to instruct the jury not to consider the second affirmative defense—the so-called Stafford title.

This title was invalid, because (1) Hastings, never having taken possession nor made a discovery nor done any work looking to a discovery, had nothing which he could convey to Stafford; and Stafford, never having taken possession nor marked his boundaries, had nothing which he could convey to defendants. (2) No discovery was made by either Hastings or Stafford, or by anyone for them or either of them.

(1)

The evidence on the subject of the taking up of the claim by Woodward in the name of Hastings reveals the work of the "professional staker." It appears from the evidence of Hastings (P. R. 275–288) that in March, 1903, said Hastings was "outside" (that is, absent from Alaska), and that he did not return until about July, 1904, and that while he was outside a Mr. Roth (who was his kinsman, his partner and his attorney in fact) entered into a "grubstake" arrangement with W. H. Woodward, a prospector. It appears from the testimony of Stafford that he (Stafford) found (set up around the property in controversy) some stakes marked with pointed arrows and bearing the name of Hastings, and also certain blazings on the trees by which he could readily trace the boundaries of the tract. There is no evidence as to who made those blazings or whether or not said stakes and blazings were the first stakes and blazings on the ground. There is no evidence that Woodward or Hastings made a discovery of gold, or went into possession or tried to discover gold; in fact, it appears that Hastings never saw the claim and did not know anything about a claim having been staked in his name, until September, 1905 (P. R. 281), when Roth sent him (Hastings) one-third of the money paid by Stafford (P. R. 282 top), together with a deed to be signed and returned (P. R. 279, bottom). Now, was this anything but a purely speculative proceeding? Did Hastings have anything to convey to Stafford?

That discovery is the initiation of the miner's title

to ground is so well established as to render the citation of authorities supererogatory. That without discovery, or possession, or attempt at discovery, he has absolutely nothing which he can convey seems to admit of but small doubt.

"It is equally the law that the placing of stakes to mark the boundaries of a tract of public land, and the recording of a notice of location thereof, without any discovery of mineral, or knowledge on the part of the person so marking of the existence of metal there, where he permits a year and a half to elapse without any effort to explore the land to discover mineral therein, as did the defendant in this case, would be justly treated as a mere speculative proceeding, and would not of itself initiate any right." (Bulette vs. Dodge, 2 Alaska, 429, the quotation therein being from Erhardt vs. Boaro, 113 U. S. 527.)

There can be no doubt that this extract from the decision of Judge Wickersham is a clear expression of the law. Again, the same Judge says:

"The greatest evil in the administration of the mining laws in Alaska is the habit of the shiftless and grasping in staking and recording mining claims, generally by powers of attorney, whereby one person often acquires claim to a large area of supposed mining ground and excludes the willing miner from working it and developing the resources of the territory. Since the threat of a lawsuit lurks behind each of these pretended locations, the prospector generally passed it by, and thus the speculative locator controls the property. * * * One of the cures for this speculative reservation of mineral lands is pre-

sented in this case. The Court ought not to assist a mere staker, after he has had a reasonable opportunity and time within which to do the necessary work to make a discovery on his claim, by restraining another prospector, who seeks to go upon the land and comply with the spirit of the mining laws."

Redden vs. Harlan, 2 Alaska, 406.

What was Hastings (Woodward) but a "mere staker." He had not even the *right of possession,* for though a person stakes out and records, that fact does not vest him with the *right of possession.* If he takes possession, he will be protected, it is true; but it is the possession that is thus protected, not the staking and marking, for his very possession would give him a right of possession; and it is a *pedis possessio* only which will be protected.

Costigan on Mining Law, 156.

In Gemmel vs. Swain, 28 Mont. 331, the Court says: "Until discovery is made *no right of possession* to any definite portion of the public mineral lands can even be initiated. Until that is done, the prospector's rights are confined to the ground in his actual possession, and until that possession is disturbed no right of action accrues. * * * The fact that plaintiff posted a notice at each of his shafts did not create any new right in him nor enlarge the right he already had. *A notice of location posted upon mineral land before discovery is an absolute nullity.* * * * He had made no discovery, and consequently no location had been made and none could be made, for a location can rest only upon an actual discovery (citing). He was simply a prospector

upon the public domain, with the bare naked possession of the ground immediately about the three shafts where he was prosecuting his work. His possession was only such as is characterized in the law as *possessio pedis,* and could not be enlarged to include the entire 20 acre tract, or the whole amount of ground which he might have claimed under one or more quartz locations."

In New England vs. Congdon, 92 P. R. 181, the California Court says: "But if, as the Court has found, the plaintiff was not on the 17th day of October, 1904, in possession of the land, it had no rights superior to that of the defendants' entering peaceably, unless by virtue of a valid mineral location. The finding that there had been no discovery of oil upon the land was, in the absence of retention of possession and a prosecution of work, fatal to the validity of plaintiffs' alleged location. * * * But where the alleged locator has not made a discovery *and has not retained possession for the purpose of prosecuting work looking to a discovery, his mere posting* of notice and marking of boundaries upon the ground will not serve to exclude others who may peaceably enter upon the land which he is not actually working or occupying."

In Olive Land and Development Co. vs. Olmstead, 103 Fed. 571, Judge Ross has said: "It is clear that the location of the lands in controversy by the predecessors in interest of defendants * * * amounted to nothing, for the reason that no discovery of oil or other mineral had then been made, nor indeed has yet been made, in or upon any of the lands in con-

troversy; it is not pretended that the defendants or their predecessors remained in the actual possession of any part of the premises, and if they had, the law is well settled that mere occupancy of the public lands and improvements thereon give no vested rights therein as against the United States, and consequently not against any purchaser from them."

In Sierra Nevada Oil Co. vs. Home Oil Co., 98 Fed. 676, the same Judge says: "Barrett during the year 1895, under whom the defendants claim, *undertook* to transfer his right to the ground in question, *which had no existence in fact or law,* to the Producers and Consumers Oil Co., which later *undertook* to transfer the same thing, *which was nothing,* to the defendant Miller, and on December 31, 1896, Miller *undertook* to relinquish to the United States *what he did not have,* viz., a right to the land in question, and immediately thereafter, to wit, on the 31st day of December, 1896, *without having made any discovery of mineral on the land, undertook to locate* the quarter section in question under the mining laws for himself and seven other persons by posting the required notice and marking the boundaries. Shortly thereafter he *undertook* to confer upon Barrett the right to enter upon and explore for and develop oil upon the claim and to dispose of the oil there found. Barrett thereupon *went into actual possession* of the land, etc. It would thus seem that * * * *followed by the actual possession of the ground by those claiming under it* and by the actual discovery of mineral within the limits of the claim by them, the requirements of the statute were met."

In Hanson vs. Craig (170 Fed. 65), this Court says: "The exclusive right of possession is by section 2322 of the Revised Statutes of the U. S. conferred only on one who has made a valid location, one of the essentials of which is, as has been said, a discovery of mineral. Prior to that time, all such mineral land is in law vacant and open to exploration and location, subject to the well-established rule that no prospector is authorized by any form of forcible, surreptitious or clandestine conduct to enter or intrude upon the actual possession of another; for every miner upon the public domain is entitled to hold the place in which he may be working against all others having no better right. Zollars vs. Evans, C. C., 5 Fed. 172. The matter is, we think, well and tersely put by Costigan on Mining Law, page 156, where he says: '*Pedis possessio* means actual possession, and pending a discovery by anyone, the actual possession of the prior arrival will be protected to the extent needed to give him room to work and to prevent probable breaches of the peace. But while the *pedis possessio* is thus protected, it must yield to an actual location on a valid discovery made by one who has located peaceably and neither clandestinely nor with fraudulent purpose.' These views are, we think, well sustained by numerous decisions of the Supreme Court, of this court, and various other courts, some of which we cite:

Del Monte M. & M. Co. vs. Last Chance M. & M. Co., 171 U. S. 55;

Jennison vs. Kirk, 98 U. S. 453;

Belk vs. Meagher, 104 U. S. 279;

King vs. Amy etc., 152 U. S. 222;
Creede vs. Uintah, 196 U. S. 337;
Cook vs. Klonos, 164 Fed. 529;
Johanson vs. White, 160 Fed. 901;
Malone vs. Jackson, 137 Fed. 878;
Nevada vs. Home Oil Co., 98 Fed. 673;
Olive L. & I. Co. vs. Olmstead, 103 Fed. 568;
Gemmel vs. Swain, 28 Mont. 331;
DuPrat vs. James, 65 Cal. 555;
Horswell vs. Ruiz, 67 Cal. 111.

Hastings, then, acquired nothing by reason of Woodward's discovery. Neither he nor anyone for him had made a discovery, and, never having taken possession, he had not even the right of possession; he did no work and he knew nothing of his ownership or reputed ownership. Therefore, having nothing to convey, he conveyed nothing. Having no rights himself, he could vest none in his grantee, Stafford.

On the point as to the effect of a conveyance of a "location without discovery" there was cited in the trial court and probably will be cited here the case of

Miller v. Chrisman, 140 Cal. 449 (73 P. R. 1085), decided September 30, 1903, in which the Court says: "They have then this right of possession and with it the right to protect their possession against all intrusions and to work the land for the valuable minerals it is thought to contain. We cannot perceive why those rights may not in good faith be made the subject of conveyance as well before as after discovery."

From this decision Judge Beatty dissents (74 P. R. 444), saying: "There can be no location of a min-

ing claim before discovery and there can be no transfer or assignment of a location before the location is complete. There can, in other words, be no assignment of a right to locate. If, in the expectation of discovery, an association of persons marks the boundaries of a placer claim containing 20 acres for each associate, I have no doubt they will be protected in their possession while they proceed with reasonable diligence to prospect the claim and that by a discovery they will perfect it; but if some of the associates withdraw before discovery, or attempt to assign their claims to those who continue the work of development, those who remain will have no right to a claim greater in the aggregate than they could have taken by an original location."

It is manifest from a perusal of the majority opinion in Miller vs. Chrisman, that the associates were in possession, proceeding with diligence to prospect the claim, and that that *possession* is what gave them *the right of possession,* and is what, in the mind of the Court, was valuable and could by them be conveyed *to Miller, who remained in possession.* This is evident, also, by reading the opinion of the same court in Weed v. Snook (77 P. R. 1023), where the Court, commenting on Miller vs. Chrisman, says: "If defendants had been guilty of such laches that it could have been presumed that they had abandoned their location, and if plaintiffs had made an open, peaceable entry and acquired *bona fide* rights at a *time when defendants were not in possession thereof and prosecuting the work of development, the case would have been very different.* But the plaintiffs at-

tempted to locate while defendants were in possession and actively preparing to drill a well, etc."

McLaughlin vs. Thompson, 29 P. R. 816, speaks of a location without discovery as "a very shadowy thing," and, "as a matter of law such a location is absolutely worthless for any purpose."

On September 2, 1904, Roth (for Hastings, who was still in blissful ignorance) *undertook* to sell to Stafford an option on what Hastings had (which was nothing). This option, being an option on nothing, does not seem to have been worthy of record—at least, it was never recorded. It is found on page 200 of the printed record; it is dated September 2, 1904, and recites the payment of $50 cash and an agreement to pay another $250 on or before September 2, 1905, or to forfeit the said $50.

In the latter part of September, 1904 (P. R. 213), Stafford, having purchased this option, this "nothing," from Hastings, goes upon the vacant, unoccupied and unappropriated public land of the U. S. (for that is all this ground then was; Hastings' location to the contrary notwithstanding), and with a gold-pan, pick and shovel makes, on the surface, what he terms, a discovery, i. e., he unearths a cent or two of fine gold. He sets no stakes, marks no boundaries, does no work, takes no possession, leaves no notice; he does not even record his alleged "option."

We hear no more of Stafford until June or July of the year following, when again he appears in this still virgin wilderness, upon this still vacant, unoccupied, unappropriated public land of the U. S., and pans again. This time he finds a few colors (P. R.

218). Again he decamps, setting no stakes, marking no boundaries, doing no work, taking no possession, leaving no notice. He does not even put the "option" on record. What is Stafford, thus far, but a prospector on the public domain? How does he differ from the thousands of other prospectors who discover "color," but nothing encouraging, nothing to justify them in locating?

On September 21, 1905, plaintiffs, in ignorance of any claim of Stafford to the ground, stake and mark the boundaries of their claim; immediately go into possession thereof, build a cabin thereon, and commence living therein, sink a shaft through 90 feet of muck, then through 25 feet of gravel, at which depth they find colors, reaching bedrock about Christmas, 1905, at which place they make a discovery (P. R. 64) —all the time having possessed and prospected this claim and diligently searched for gold thereon.

Stafford, having left the claim as aforesaid in July, 1905, remains absent until December, 1905 (P. R. 270). However, on the 23d of September, 1905 (two days after plaintiffs' stake, mark and take possession), he puts on record a deed (?) from Hastings dated September 8, 1905, conveying to him this "nothing" (P. R. 229). This is the earliest notice, if notice it may be called, that Stafford has or claims to have any rights. Where is the evidence that Stafford ever did anything else on or with this ground except to sell or lease his interest (which was nothing)? Where is the evidence that Woodward or Hastings discovered gold, and where is the evidence that Stafford staked or marked this claim, and where

is the evidence that anyone but plaintiffs made a completed location?

The discoveries (if such they may be called) made in June or July, 1904, and September, 1905, were Stafford's discoveries, not Hastings' or Woodward's (P. R. 268). They were independent of Hastings or Woodward.

Assuming, then, that Stafford made the first discovery of gold upon the claim, the inquiry suggests itself: What must a man (who has made the first discovery on Government land) do, in order to keep others out and vest himself with the "right of possession"? Why, manifestly, he must mark the boundaries of his claim so that the same can be readily traced, or he must go to work, go into possession. Stafford might have marked any boundaries he should choose. What did he mark? Nothing. What did he do? Nothing, but go away.

Plaintiffs knew nothing about Stafford when they marked and went into possession; they did know or could have known that Hastings had staked (P. R. 317), but it is reasonable to presume (the evidence is silent) that they knew that Hastings had made no discovery and so had no rights—not being in possession. And, there being nothing done on the property and no one in possession, and no marks or notice of any prospector or claimant other than Hastings, what was there to prevent plaintiffs from initiating a claim by marking, going into possession and diligently searching for gold. If there was any prospector or claimant later or other than Hastings, where are his marks? Where is there any indicia of his possession or of work done?

ADOPTION OF STAKES.

But it may be contended that Stafford adopted the stakes and marks, which were on the ground when he discovered. Conceding, for the sake of argument, that he could do this, yet where is the evidence that he did do so? What act evinces an intention to adopt them? Did Stafford refer to them in any way in his notice? No; for he had no notice. Besides, what, in law, were those stakes and marks? No more than the trees, the rocks, the springs there abounding in a state of nature and which, for aught that is shown, would have been just as adequate to bound this ground as stakes placed there by the hand of man. If Stafford, after having made a discovery, had given any notice that he intended to hold as a mining claim certain ground included within certain stakes (describing them) as the same appear on the ground, of course it would not be necessary for him to pull up those stakes and set them down again in the ground, but nowhere does he refer to those stakes.

In Conway vs. Hart (62 P. R. 44), which is the only case cited by Lindley on the adoption of old stakes, the court says: "Objection is made by defendant that the plaintiffs in making this location did not put in new stakes to mark the boundaries, but *referred to and used* stakes which were standing on the ground and which had been put in by them on a former occasion. It appears that the plaintiffs had located the claim now called the Belmont several years prior to April, 1894, and had placed stakes with mounds of rocks at each corner of the surface ground

and at the centers of the end lines, and that when they concluded to make a second location, under which they now hold, they found those stakes intact and adopted them—*their notice of location referring to those stakes;* and defendant contends that the location was invalid because plaintiff did not actually put up new stakes. This contention is not maintainable." But that is not the case here. Here was no notice of location and no reference to other staking or marking; there, there was a notice of location, and it referred to the former stakes as being the stakes of the new location.

If Stafford could, silently and secretly, adopt the stakes and markings then on the ground, manifesting his adoption in no open, visible way—by no affirmative and public act of his—why might he not in like manner and with equal efficacy, adopt trees, rocks and springs bounding the claim. How is a later prospector to know that he has any claim to the ground?

We are asked to believe that a person may go upon the vacant, unoccupied and unappropriated public land of the U. S., see a few colors of gold in the ground, and, without doing more, claim a title to 20 acres of mining ground embraced within six objects which he sees there, without at any time stating what those objects are, without doing any work, without going into possession, without leaving any notice or sign. We are asked to believe that such claim of title will be effective to take mining ground from *bona fide* miners and prospectors who (knowing that no discovery had been made by or for the only person

whose name appears on the ground or in the public records as being connected with the claim, and knowing that no work had been done and no possession taken) go into actual, open, visible and notorious possession, erect cabins, sink shafts through 90 feet of muck and 25 feet of gravel, and labor earnestly in an honest endeavor to "develop the resources of the territory."

"It is obvious, when the acts making up a valid location, are accurately understood and considered, that there must be some notice or sign given from the beginning, as it is frequently by this means alone that the prospector is made acquainted with the claims of the previous locator."

20 A. & E. Ency. 709.

"The Act of Congress does not require that any notice of location be given, but the practice has been too long recognized by both miners' rules and State statutes to be nonessential, notwithstanding this omission."

20 A. & E. Ency. 711 (e).

"Independently of statute, therefore, and as a means of creating to some extent *prima facie* evidence of claim, it would seem to be absolutely essential that one taking possession of mining ground, if not in actual and open possession, should give some notice of the nature, purpose and extent of his claim. Prospectors having equal rights, this is the only way in which one may secure an exclusive right over the other."

Id. 712 and note 1.

"Some mining customs of a general nature which

have been repeatedly recognized by judicial decisions may be said to have become a part of the common law of the land."

Id., note 1 and cases cited.

(2)

STAFFORD'S DISCOVERY.

But we submit that the evidence does not show a discovery by Stafford or anyone for him; at the most, all that is shown are "indications," "possibilities," "hope," "conjecture." The showing is of the very flimsiest character—it cannot be said to amount to a scintilla.

It is manifest that Stafford did not discover anything on this claim to justify him, when in September, 1904, he found a small piece of quartz "about the size of a grain of wheat" with a small piece of gold adhering to it (P. R. 215). The panning was done in a draw or gulch "coming down from the hills"; it was done with an old gold-pan, used before (P. R. 212, 213). At that time several holes had been sunk on Dome Creek about a mile from the place where he discovered this piece of quartz. It is not shown or claimed that bedrock had been reached, or pay or even colors discovered, in those holes, or on Dome Creek at all. It cannot be seriously contended that the finding of that piece of quartz is sufficient to base a location upon, when one considers that he did absolutely nothing toward taking possession of the claim or doing work thereon; contenting himself by going away and not returning until June or July, 1905. He says that when he came back in June or July of 1905, he found Graham and Pounder sluicing on

Number 4 Below, Second Tier (adjoining claim), and that he knew, *at that time,* that they had discovered pay (P. R. 219, 220), and he knew (at that time) that Cook and Ridenour had sunk a hole on No. 4 (P. R. 222), and that Klonos had sunk a hole on No. 4, and he knows (now, at time of trial) that Cook and Ridenour and Klonos found pay (P. R. 223). On this occasion, panning the surface of the muck in the draw, he says, he found a "few colors" (P. R. 218). We submit that at that time (June, 1905) the only discovery of pay on Dome Creek of which he knew anything, according to the evidence, was that made by Pounder and Graham in their shaft. Then he is asked if the finding by him of these colors, taking into consideration the location of that property with reference to the width of that valley, etc., "would justify him, as an ordinarily prudent man and not necessarily a skilled miner, in the further development of that property," and he answers, "It certainly would" (P. R. 224). It would *now, in the light of subsequent events;* but evidently it did not and "would not" at that time, for again he does nothing with the claim but to go away from it—not to return again until December, 1905. Evidently he did not consider these "colors" to be even encouraging, for later on he says, "Well, if I was prospecting, according to my own idea I would pan anywhere in any of the gulches or on the surface, or on the hillsides at the head of these creeks and see what *indications* I could find." Q. "Then, if you found anything, what would you do?" A. "Well, if it were anything that would encourage you—*if it was a deep*

creek I would sink, of course, and look for bedrock to see what it contained" (P. R. 215).

When it is considered that it was only after sinking through 90 feet of muck and 25 feet of gravel that plaintiff found even colors; that Cook and Ridenour did not find colors until they were down 15 feet in the gravel and 75 feet from the surface (P. R. 112), it is the more apparent what a "deep creek" it was, and upon what a flimsy basis Stafford's claim rests. We submit that what he found was a mere "indication" not even "encouraging" (for he did not sink to bedrock to see what "it contained," and according to his testimony that is what he would have done if he had thought the "indications" were encouraging).

"Indications," "conjecture," "hope," will not amount in law to discovery.

"To constitute a discovery the law requires something more than conjecture, hope or even indications. The geological formation of the country may be such as scientific research and practical experience have shown to be likely to yield oil in paying quantities. Taken with these there may be other surface indications, such as seepage of oil. All these things may be sufficient to justify the expectation and hope that upon driving a well to sufficient depth oil may be discovered, but one and all they do not in and of themselves amount to a discovery."

Miller vs. Chrisman (supra).

Nevada Sierra vs. Home Oil (supra).

It is submitted: That the evidence shows that Stafford did not make such a discovery of gold as is required by law.

In April of 1906 (seven months after plaintiffs had marked and gone into possession; four months after they had discovered gold at the bottom of their shaft 15 feet below the surface of the ground), Stafford surveys his claim. Not until that time (if then) did he have a completed location; but, between Stafford's discovery (?) and his survey, the rights of Rooney and associates had attached as aforesaid.

ERRORS NOS. III AND XVII.

Error No. III is to the refusal of plaintiffs' motion for a directed verdict (P. R. 368) and Error No. XVII is to the refusal of plaintiffs' motion for judgment *non obstante veredicto* (P. R. 361).

If the fifth and fourth Assignments of Error are well taken, *eo constat* that the third and seventeenth Assignments of Error cannot be successfully gainsaid.

Plaintiffs, therefore, ask this Court to reverse and remand this case, with instructions to the lower court to render judgment in favor of plaintiffs and against defendants Barnette, Cook, Ridenour, McGinn and Sullivan for $67,610, with interest from June 2, 1910, because, viz.:

There was and is nothing for a jury to pass upon, as there was no controversy in the evidence as to plaintiffs' marking, staking, recording, possession, exploitation, discovery, ouster or damages, and as there was no legal showing to sustain any of the first three affirmative defenses, and as the fourth affirmative defense (going only in mitigation of damages) could not, if true, affect the right of plaintiffs to the net amount of gold extracted, to wit, $67,610.

IF THIS COURT REFUSES TO REMAND THE CASE WITH THE INSTRUCTION TO ENTER JUDGMENT AS ASKED FOR ABOVE, PLAINTIFFS CONTEND THAT THE JUDGMENT OF THE TRIAL COURT IS ERRONEOUS, AND THAT THEY ARE ENTITLED TO A NEW TRIAL ON ACCOUNT ALSO OF THE REMAINING ERRORS ASSIGNED, WHICH WILL NOW BE DISCUSSED:

ERROR NO. XIII.

This assignment is to error of the Court in the giving of instructions No. V and VI concerning the Dome Group Association claim. The said instructions are found on pages 337–340 of the Printed Record. The exception is at page 358 of the Printed Record and finds fault with the instructions because the Court therein tells the jury that the validity or invalidity of said claim is dependent upon a knowledge by *all* the locators thereof of the fact that by such location E. T. Barnette was to acquire more than 20 acres.

Plaintiffs contend that these instructions do not accurately state the law. A device by which any one locator is to acquire more than 20 acres is forbidden by the statute (R. S. U. S. 2331). The language of the statute is, "and no such location shall include more than 20 acres for any individual claimant." As was said by this Court in Cook vs. Klonos (*supra*), this was a device by which Barnette was to acquire more than 20 acres, although he is not a locator by name on the ground or of record. The exception finds fault, also, because that part of the

instruction above referred to is in direct conflict with that other portion in which the Court says: "In other words, an Association location may be avoided by *any* agreement, etc." (P. R. 339, bottom), and, being so irreconcilable, it tends to mislead and confuse the jury. What is the jury to understand? Is, or is not, a knowledge *by all* the locators, of the iniquitous scheme, requisite to avoid the location? If only one of the locators is innocent, does that relieve the location from the invalidity entailed by the guilt of the other seven? If so, then Barnette, Cook and the "absent six" would only have to keep Ridenour in ignorance, and their "dummy" location would be a "valid and subsisting" claim, and would keep all other claimants off the entire 160 acres, and they would thus accomplish "by indirection" what the law forbids by direction. When this Court, in the modified opinion in Cook vs. Klonos, said that it was not satisfied that Cook and Ridenour knew of or participated in the fraudulent arrangement, and that, if they did not, they might file a supplemental bill showing their innocence, and select, each, 20 acres, it could have had reference only to the rights of Cook and Ridenour against the guilty six; the rights of these plaintiffs who had, in the meantime, located and gone into peaceful possession (P. R. 181) of a portion of the 160 acres were not then before the Court for Rooney and associates were not parties to 278, and the Court did not know that any conflicting location had been made. If it had so known, we apprehend that its language would have been in line with the language of Judge Hanford in

Durant vs. Corbin (94 Fed. 382); i. e., it would have limited the right given Cook and Ridenour to the selection of ground outside of that which had been taken by these plaintiffs.

It would seem to be doing violence to the language and meaning of the Court to torture what it said in Cook vs. Klonos into a declaration that, if Cook and Ridenour were innocent, the original "dummy" location is potent to keep others off the entire 160 acres. It cannot be but that the location of the Dome Group by Barnette through the use of "dummies" was *absolutely void as a location of 160 acres,* for a location of an association claim is one distinct entity—it is *one location* of 160 acres, not 8 separate locations of 20 acres each. What if Ridenour be innocent? The staking, marking, recording, discovery, every act performed by him, was an act performed not by him alone but by him and seven others. In his one person he combined himself and seven others. May a stake be 1/8th set and 7/8ths not set? May a discovery be 1/8th made and 7/8ths not made? May the boundaries be said to be marked when they are only 1/8th marked? The statute requires a location, not a 1/8th location.

But conceding, for the sake of the argument, that in the modified opinion in Cook vs. Klonos this Court did mean to point out a way in which Cook and Ridenour might cure the illegality of the Dome Group claim *as against all the world,* it is apparent that they did not follow the way pointed or any other way. They did not cure the illegality. When plaintiffs located No. 3, the Dome Group location was

tainted with its original iniquity, and was impotent to keep others off—it was not a valid subsisting location, and its invalidity has not been cured to this good day.

ERROR NO. XIV.

This has already been discussed under heading ERROR NO. IV, and need not here be further referred to.

ERROR NO. X.

Already discussed under heading ERROR NO. V.

ERRORS NOS. XI AND XII.

Error No. XI is assigned to the refusal of the Court to charge that it is immaterial whether the tent of Cook and Ridenour was on Claim No. 3 or Claim No. 4; and Error No. XII is to Instruction No. 4, wherein the Court says: "Before you can find a verdict for the plaintiffs, you must find by a preponderance of the evidence that at the time they entered upon the premises in controversy and claim to have located the same as a placer mining claim, that the same was unoccupied, unappropriated public domain of the United States."

In this instruction the Court tells the jury, in substance, that if the claim in controversy was occupied at the time of plaintiffs' entry, they cannot find for plaintiff. We maintain that this is not the law, and that the use of the word "unoccupied" was prejudicial error. The vice of the instruction is accentuated by the fact that the Court in Instruction No. XXVI (P. R. 354) defines "unappropriated" as "not covered by any prior subsisting location," but does not give the legal meaning of "unoccupied."

The use of the word "unoccupied" without definition or explanation would lead the jury to believe that if anyone was living on the claim at the time, no entry, however peaceable, could be made. Defendants introduced evidence that at the time of plaintiffs' entry, they were living on the claim (P. R. 177). This was denied by plaintiffs (P. R. 66). Plaintiffs' entry was peaceable (P. R. 181). By plaintiffs' request No. XIX (P. R. 332) the Court is requested, but refuses, to charge that "it is immaterial, so far as the rights of the parties are concerned, whether the tent of Cook and Ridenour was on No. 3 or No. 4."

ERRORS NOS. XV AND XVI.

Already discussed under heading Error V.

ERRORS NOS. VI, VII, VIII, IX, XVIII AND XIX.

Involved in Errors already discussed.

ERROR NO. I.

If there was anything to submit to a jury, plaintiffs were entitled to have it submitted to a jury chosen, impaneled and sworn according to law. We maintain that the juror Derby was not a lawful juror because he was not an inhabitant of the District of Alaska.

The challenge for cause was made, denied and exception taken (P. R. 50–56). Plaintiffs' last peremptory was exercised on the obnoxious juror (P. R. 56). O. H. Bernard was called to fill his place and his *voir dire* is set out in full (P. R. 56 et seq.); that *voir dire* developed no facts which would have

justified a challenge for cause, but it did develop facts which would have naturally led plaintiffs to exercise a peremptory upon Bernard, if the peremptories had not been exhausted (P. R. 63, top). This juror had had trouble over claims of his own; "some parties, we presumed, jumped some of our ground" (P. R. 57); the difficulty was settled by compromise (P. R. 57); he knows all the defendants except Cook; knows none of the plaintiffs (P. R. 58); is an "association" claim locator (P. R. 61). "Mr. McGinn was our attorney" (P. R. 61). It is difficult to conceive where a peremptory could have been better placed.

Was it error to overrule the challenge to Derby?

The qualifications of a juror as provided by the Alaska Code are that " * * * he must be an inhabitant of the District * * * " (Carter's Code, section 170, page 179; section 11, page 47). If one be not an inhabitant, he is not competent as a juror (Id., section 11, page 47); incompetency is ground of challenge for cause (Id., section 174, page 179). Only three peremptories are allowed (Id., section 180).

Derby's *voir dire* is not lengthy, and we invite the Court's attention thereto. We think it shows that he is not an inhabitant of the District of Alaska, but is a mere sojourner therein; he is the purser of a Yukon River steamer, coming to Alaska in the summers and in the winter returning to his home in San Francisco; he goes wherever his employer directs him to go. In 1908 he was not in Alaska at all; does not consider Alaska as his place of residence—

is here "merely temporarily and presumes he will be here next year."

Who is an inhabitant? 4 Words and Phrases, 3596.

Respectfully submitted,

LOUIS K. PRATT,

R. W. JENNINGS,

Attorneys for Plaintiffs.

No. 2005.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

WILLIAM ROONEY, JOHN JUNKIN, G. W. JOHNSON and AUGUST PLASHLART,

Plaintiffs in Error,

vs.

E. T. BARNETTE, J. C. RIDENOUR, HENRY COOK, JOHN L. McGINN, M. L. SULLIVAN, ATWELL RILEY, a mining co-partnership composed of C. B. ATWELL and J. E. RILEY, ENSTROM BROS., a mining co-partnership composed of L. ENSTROM and O. ENSTROM and AUGUST PETERSON,

Defendants in Error.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR JOHN L. McGINN, M. L. SULLIVAN, J. C. RIDENOUR, HENRY COOK.

METSON, DREW & MACKENZIE,
Attorneys for Defendants in Error John L. McGinn, M. L. Sullivan, J. C. Ridenour, Henry Cook.

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No. 2005

BRIEF ON BEHALF OF DEFENDANTS IN ERROR JOHN L. McGINN, M. L. SULLIVAN, J. C. RIDENOUR, HENRY COOK.

STATEMENT OF THE CASE.

This is a writ of error from a judgment in an ejectment to recover from the defendants in error placer claim No. 3 Below Discovery on the right limit of Dome Creek, Alaska. Thereafter the action was dismissed as to all excepting Barnette, Cook, Ridenour, McGinn and Sullivan. The original and supplemental complaints were the usual ones in ejectment, alleging ownership and possession since September 21, 1905, of the ground in controversy, and ouster in September, 1908, by the defendants in error, and claiming damages (Tr., 3).

The amended answer of the defendants sets up a general denial and three affirmative defenses, viz:

(1) Dome Group Association Title, which alleges ownership and possession of the Dome Group Association Claim of 160 acres by Henry Cook, J. C. Ridenour, A. T. Armstrong, W. H. Sumner, Y. L. Newton, M. E. Armstrong, L. T. Selkirk and A. R. Armstrong, M. L. Sullivan and John L. McGinn, describing it by metes and bounds, and as including the ground in controversy long prior to the commencement of the action.

(2) The Stafford Title, covered by the defense that E. T. Barnette, J. C. Ridenour, Henry Cook, J. C. Ridenour, Henry Cook, M. L. Sullivan and John L. McGinn are the owners and in possession of placer mining claim No. 3 Below Discovery.

(3) The Ridenour Title covered by the defense that J. C. Ridenour is the owner and in possession of a claim covering the larger portion of the ground in controversy.

(4) A certain defense as to the good faith of the defendants other than Barnette, Ridenour, Cook, McGinn and Sullivan in operating the ground under leases from the latter.

The plaintiff replied denying the title of the defendants under all of these titles and alleging that the Dome Group Association was void because "dummy" locators were used.

The case was tried before a jury and the following evidence developed:

The plaintiffs introduced evidence to prove that Rooney, Johnson and Plaschlart staked No. 3 Below Discovery on the first tier and right limit of Dome Creek on the 21st day of September, 1905.

That thereafter they prospected the claim and about Christmas, 1905, reached bed rock in a shaft they had sunk thereon and discovered gold (Tr., 63-4). The plaintiffs then introduced portions of certain depositions of Barnette, Cook and Ridenour, taken in a case numbered 278 in the same Court and No. 1510 in this Court, wherein Cook, Ridenour, A. T. and A. R. Armstrong, W. H. Sumner, Y. L. Newton and L. T. Selkirk were plaintiffs and John Klonos and others were defendants (Tr., 67, 95, 115), and also introduced the

testimony of said three parties given in this other case wherein the plaintiffs here were not interested (Tr., 125, 136).

This testimony concerned the manner and making of the location of the Dome Group Association claim in the names of Cook, Ridenour, the two Armstrongs, Selkirk and Newton. It appeared uncontradicted from this evidence of plaintiffs that this association claim was located and the boundaries properly marked on the 23rd or 24th of March, 1905, and a discovery made in the gravel at a depth of about 75 feet on the 15th day of April, 1905 (Tr., 112).

The defendants introduced the direct testimony of Ridenour (Tr., 161 *et seq.*) and of Henry Cook (Tr., 288 *et seq.*) relative to the marking of the Dome Group location by Ridenour and Cook for and in the names of themselves, the two Armstrongs, Selkirk and Newton, which was to the same effect regarding the marking of the boundaries and the making of a discovery as that introduced by the plaintiffs; and further showed that neither McGinn, Sullivan, Cook or Ridenour ever had any knowledge prior to the location of the Association claim that Barnette (who had made the arrangements with Cook and Ridenour to stake the said claim and held the powers of attorney of the other six locators whose names he had given Cook and Ridenour) had any expectation of being interested in the ground. Evidence with relation to the Ridenour selection was also

introduced but the Court withdrew this defense from the jury.

Evidence was introduced relative to the Stafford location, which was prior in point of time to either that of the Rooney or the Dome Group Association.

It appears uncontradicted that in January, 1904, U. G. Hastings and Mr. George Roth were partners, and Hastings, through his partner Roth, put up money and provisions to grubstake Woodward, who staked No. 3 Below Discovery First Tier Right Limit on Dome Creek in the name of Hastings on January 2, 1904 (Test. Hastings, Tr. 274 *et seq.*), and a location notice being thereafter recorded on March 24, 1904 (Test. Stafford, Tr. 225).

Thereafter on September 2, 1904, Hastings through Geo. Roth, his attorney in fact, gave an option to Richard Stafford to purchase said location for $250, said option to continue until September, 1905 (Tr., 200). At this time Stafford discussed the question of whether or not a discovery upon the ground had been made with Woodward and Roth. There was some question at that time about what actually constituted a discovery, Woodward claiming to know what a discovery really was, and Stafford was authorized to go out on the gound and make a discovery and satisfy himself (Tr., 204). Stafford went out on the ground in September of 1904, to see that the boundaries were all right and to make a discovery if possible. He testified to finding all of the six stakes of Hastings, that the lines were

blazed between them, and that all of the boundaries of the claim were so marked that a prospector in good faith could easily trace them (Tr., 204-211). That at this time he went down into a gulch at the lower end line of Three, about 150 or 200 feet therefrom. This gulch ran clear across the claim and was between 10 and 15 feet deep. He panned in this gulch which contained fine pieces of disintegrated rock, gravel, black sand and silt; in this he discovered fine gold and particles of quartz with gold in it (Tr., 213-215). He went over on to the ground again in June, 1905. At this time he saw all the six stakes he had seen in September, 1904 (Tr., 217), and again panned and found colors of gold in the same gulch or draw (Tr., 218).

It further appeared that in March, 1906, Stafford had the claim surveyed. He went out together with Woodward, who had originally staked the ground. Woodward pointed out the stakes and they were the same stakes Stafford had seen there in September, 1904, and June, 1905, with the exception of the northeast corner stake which had disappeared. They set a temporary stake there and about two weeks later went out again with the surveyor to survey the ground and put a permanent stake in its place (Tr., 248-256).

When he was there in 1904, there had been several holes sunk in Dome Creek about a mile away from the claim. When there in 1905, there was holes on claims in the immediate vicinity and gold found. Pay had been discovered on the second tier of Four in the Spring

of 1905, by Pounder and Graham in a shaft about from two to four hundred feet from the place Stafford found this gold in the draw and about 100 feet from the northeast corner of the claim (Tr., 219, 220, 224). It appeared further that at this time pay had been found in the shaft on No. 3 Above (Tr., 223) and on the dividing line between first and second tiers on what was called either the upper end of Five or the lower end of Four (Tr., 222). Stafford was a miner of experience in Dawson for several years prior to 1904 and since that year had been prospecting in the Fairbanks Recording District and testified that the discovery he made on the ground staked by Woodward for Hastings, taken in connection with the location of the ground with reference to the fact that gold had been discovered in paying quantities above and below it and within 100 feet of the northeast corner of the claim, would justify an ordinarily prudent man not necessarily a skilled miner to go ahead and spend money in the development of the ground (Tr., 223-4).

Stafford exercised the right to purchase the ground under the option in September, 1905, and a deed was executed to him therefor (Tr., 229-230). Thereafter his interest by mesne conveyance (Tr., 232-235, 236, 239, 241) vested in the defendants in error, Barnette, Ridenour, Cook, McGinn and Sullivan. According to the admitted recitals of the transcript there was evidence that at the time that plaintiffs staked their ground, they knew or could have known of the prior

staking of the Hastings claim (Tr., 317). The location notice was of record (Tr., 225-6). A written lease was introduced from Stafford to Tracy and Percy Hope, dated December 20, 1905, for 660 feet of No. Three; also another lease about the same time between Stafford, de Journel, Crawford and Miller, as lessors, and Weimer and Ness as lessees for a part of the same ground.

There was also evidence proving that at the time of the staking of the Dome Group Association and when gold was discovered therein, and at the time McGinn and Sullivan contracted for a one-third interest in the claim that neither McGinn nor Sullivan knew there was any agreement or understanding that Barnette should receive a half or any portion of the claim, or that any of the locators were to acquire more than twenty acres by that location (Tr., 317).

There was also evidence that the case of *Cook* vs. *Klonos* was a suit brought by Henry Cook, J. C. Ridenour, A. T. Armstrong and the other persons named as locators of the Dome Group Association claim against John Klonos and several defendants, including Richard Stafford, the same being cause No. 278, to clear the title of said Henry Cook, and the other plaintiffs therein against the claims of those defendants and said suit resulted in a non-suit (Tr., 318).

Upon the evidence, a verdict was returned in favor of the defendants. From the judgment therein the plaintiffs prosecuted this writ of error, basing the same

mainly upon alleged erroneous instructions of the court below or its failure to give the instructions requested by plaintiff.

ARGUMENT.

The record shows undisputed three things:

(1) The Hastings location on which the Stafford title is based was staked prior to the *4th of March, 1904,* and discovery made by Stafford in *September, 1904 and June, 1905* (Tr., 213, 218, 225).

(2) The Dome Group Association Claim was staked in *March, 1905,* and discovery was made in April, 1905 (Tr., 17, 21, 313).

(3) The Rooney location was staked in *September, 1905,* and discovery made about *Christmas, 1905* (Tr., 63-4).

In point of priority of location the Hastings claim stands first, the Dome Group second, and the Rooney location third.

No contention is made as to either the fact of the proper marking of the Dome Group Association so that the boundaries could be readily traced or that discovery was made thereon. In fact the testimony introduced by plaintiffs to that effect is uncontradicted.

The objection to the said location is based upon its alleged fraudulent character in that one Barnette, who held the powers of attorney of six of the locators therein, had an *expectation* that these six locators would

award him a half of each of their respective interests therein, when he made the arrangement with Cook and Ridenour, the other two locators, to stake the ground and upon an agreement with the defendants in error McGinn and Sullivan that they were to have an interest in excess of a legal one in the ground asserted to have been made prior to location.

There is no contradiction of the fact of the staking of the Hastings' claim and a discovery thereon long prior to the Rooney location. But plaintiffs in error question the *character* of the discovery and the fact that it was made by Stafford instead of Hastings.

The first point argued by counsel is as to the error of the Court in refusing to withdraw the Dome Group defense from the jury, which also covers the motion for a directed verdict.

I.

The Court did not err in refusing to withdraw the defense of the Dome Group location from the jury, or to direct a verdict for plaintiffs.

The only grounds upon which counsel base their contention that the Court should have withdrawn such defense from the jury is that the depositions and testimony introduced by the plaintiffs from a case involving the title to the Dome Group, but between entirely different parties was the main testimony in this case between Rooney and others, and the defendants in error,

and that the testimony offered in this case did not modify the evidence of said depositions.

While not asserting in terms that the decision in the case referred to (*Cook* vs. *Klonos,* 1510 C. C. A.) was conclusive in the case at bar, counsel's statement amounts to that, and in fact the whole theory of the case as presented by plaintiffs seems to have been based upon the proposition of the conclusiveness of that case upon the litigants in the case at bar. There can be no merit in that position. Counsel could by no possibility have pleaded or introduced in evidence the judgment in the case of *Cook et al.* vs. *Klonos et al.,* as a bar in this action.

The doctrine of former adjudication could only apply as to matters that have been finally decided as between the same parties or their successors in interest. Plaintiffs could not therefore by implication introduce the judgment in the Cook-Klonos case into the case at bar as a matter of evidence. And yet that is exactly what is attempted to be done by counsel when he asked that the Dome Group Association title be withdrawn from the jury.

In the case cited, this Court sustained the judgment of the court below non-suiting the plaintiffs therein upon the ground that there was a distribution of the interests in the location in violation of law and holding the location void as to six of the locators for that reason.

But the judgment in that case on appeal could have

no conclusive effect in this case, other than in the application of the principles of law laid down therein so far as they were relevant to the facts of this record.

That judgment was made in a cause in equity upon different evidence between different opposing parties and involving a conflict between a different piece of mining ground and that of the Dome Group. The testimony in the Cook-Klonos case was entirely different from that introduced here upon the proposition of the fraudulent inception of the Dome Group claim, and only a portion of—excerpts from—the depositions and testimony in that case was introduced in the case at bar, notwithstanding counsel's assertion that there was no modification in the testimony herein.

As a matter of fact the testimony in regard to the making of the Dome Group location upon this point was entirely different from that involved in the Cook-Klonos case.

One of the elements which entered into the decision of this Court in arriving at a conclusion as to the fraudulent character of the location in the Dome Group case was that an agreement had been made *prior* to the location of the ground, wherein McGinn and Sullivan were to have an interest in the location greater than the law allowed.

While the testimony in that case may have left open the question as to whether or not there was any such agreement relative to McGinn and Sullivan, this record leaves no doubt upon the fact that such agreement to

give to McGinn and Sullivan a third interest in the ground was made *after* the location had been completed by marking and discovery and at or about the time when Klonos and others having "jumped" a portion of the ground, litigation was necessary.

McGinn and Sullivan were not parties in the former action. They are parties to the record in this, claiming an interest in the ground in controversy, partly by virtue of the agreement made by Barnette with them at the time when Cook and Ridenour obtained an additional sixth interest in the ground for the doing of some further development work, and about the time when the Cook-Klonos suit was instituted.

Says Barnette:

"Q. Whom did you authorize Cook and Ridenour to stake this Dome Group claim for in the spring of 1905?

"A. I gave them the names of the six powers of attorney that have been shown here.

"Q. Was there an understanding that anybody besides Cook and Ridenour should have any interest in that group?

"A. The parties that I gave them the names of would have an interest.

"Q. *Besides those parties and Cook and Ridenour, who else were to have an interest in the group?*

"A. *No one.*

"Q. *Are you positive of that?*

"A. *I am.*

"Q. *Was it understood or agreed at that time*

at your bank that McGinn & Sullivan were to have any interest in that group?

"A. *No, sir.*

"Q. What was the agreement that was made with them?

"A. McGinn & Sullivan were to get a one-third interest in that group.

"Q. What for?

"A. For looking after the litigation and protecting the property.

"Q. *Did you advise them at that time that a suit had been brought in their names to recover any interest in the claim?*

"A. *I told them the ground was in litigation*" (Tr., 157-8).

And again:

"Wasn't it understood and agreed between you and Cook and Ridenour at this first meeting held at your bank March 20th, 1905, that McGinn and Sullivan were to receive an interest in the Dome Group?

"A. At what time?

"Q. At the time of the meeting in your bank about the 20th of March, 1905?

"A. No. I don't think McGinn and Sullivan's name was mentioned at all.

"Q. Are you certain about that?

"A. I am sure of it.

"Q. Had you any talk with McGinn and Sullivan or either of them prior to your understanding and agreement made with Cook and Ridenour in your office about the 20th of March, 1905?

"A. No, I had none.

"Q. Didn't you or Cook or Ridenour to your knowledge consult with your attorneys upon the question of the necessity of discovery upon this ground in regard to its being open for location?

"A. No.

"Q. No attorney whatever was consulted by you upon that subject prior to the making of this location?

"A. Not that I remember of.

"Q. Nor by any of the plaintiffs to your knowledge? . . .

"A. Not to my knowledge, no" (Tr., 93-4).

And again referring to the time when the agreement was made relative to McGinn & Sullivan getting a one-third interest Barnette testifies:

"Q. About what time was that agreement made and what were the terms of it? . . .

"A. *It was about the time that I made arrangements with Cook and Ridenour to sink those two holes"* (Tr., 149).

(See also Tr., 89-90).

Here is a definite time as to when the arrangement was made with McGinn and Sullivan and Barnette fixes it *after* the location had been completed, to wit: some time in April or May, 1905.

It appears from the uncontradicted testimony of Ridenour and of Cook that they had no understanding whatever with Barnette as to any interest of McGinn and Sullivan in the location; that the first time they

had any dealings with McGinn and Sullivan was when they, after completing the location, came into Fairbanks to record the notice of location, which under the law was not necessary, and when Klonos and others having jumped the claim, legal advice was necessary.

Says Ridenour:

"MR. McGINN—Q. Now Mr. Ridenour, before you went out there to stake this property, was there any understanding as to what interest you and Mr. Cook were to have in the property?

"A. Before we went out to stake it?

"Q. Yes sir.

"A. Yes, we had an understanding as to our proportion.

"Q. What were you to receive?

"A. A one-eighth each.

"Q. Did you have any understanding or agreement with E. T. Barnette as to what, if any interest, he should receive in the property?

"A. No sir.

"Q. Did you know of any arrangement or agreement that E. T. Barnette had with these other six locators?

"A. No sir, I had no knowledge of it.

"Q. Did you ever have any conversation with E. T. Barnette on the subject of what interest he was to receive in this property?

"A. No sir.

"Q. As a matter of fact, do you know up to the present time what arrangement he ever had with the people that you located for, other than what you have here heard in this testimony?

"A. No sir. I know nothing of his business with these people. . . . (Tr., 174-5).

"Q. Now, at that time, were you acquainted with McGinn and Sullivan?

"A. *No sir. I never saw McGinn and Sullivan on the streets even that I know of.*

"Q. Prior to the time that this property was located out there, prior to the time that you made your discovery, did you know of any understanding or any agreement whereby McGinn and Sullivan were to have any interest in the property?

"A. No, sir, I knew nothing about any agreements of that nature.

"Q. As far as you knew who were to be the owners of the property?

"A. Henry Cook, J. C. Ridenour, Sumner Selkirk, Newton and the three Armstrongs" (Tr., 176).

And Cook testified:

"Q. Mr. Cook, when your deposition was taken in this case (Case No. 1510, Tr., 95) you testified there was an understanding or agreement that Captain Barnette was to have a third interest in this association, what have you to say as to that?

"A. Well, that's a mistake; he never was to receive a third of our interest, nothing from us.

"Q. Did you know what interest at the time Ridenour staked this Dome Group that Barnette was to receive in the property?

"A. No, we didn't know what interest he was to get at all. . . .

"Q. Did you know about McGinn and Sullivan having any interest in the property?

"A. No. . . .

"Q. Did you know anything about McGinn and Sullivan at that time?

"A. No.

"Q. Do you remember of ever having seen any of us (McGinn and Sullivan) prior to the time the claim was located?

"A. No, no.

"Q. Do you know what time Mr. McGinn arrived in Fairbanks?

"A. No, I don't know nothing about what time he arrived in Fairbanks.

"Q. When was the first dealing you ever had with McGinn and Sullivan?

"A. I think the first I ever had to do anything with McGinn *was when I came in to record the claim.*

"Q. About what date was that?

"A. About the middle of April, I think.

"Q. The location notice is dated the 17th of April.

"A. Yes sir; that's about the time.

"Q. What dealings did you have with McGinn at that time?

"A. Just the recording of the claim.

"Q. What did McGinn do, if anything?

"A. Well, he told me to go ahead and record the claim" (Tr., 293-4).

It will be remembered that the discovery of gold in the Dome Group was made on April 15th (Tr., 169,

313), so that the location was perfected before either Cook or Ridenour saw either McGinn or Sullivan. In the meantime Klonos entered on the ground and Cook went to Barnette who caused McGinn and Sullivan to institute the former action of *Cook* vs. *Klonos*. On this point Cook testified:

"Q. Do you remember what date that was, Mr. Cook, that you made that discovery?

"A. That was about the middle of April, something near there. . . .

"Q. Well after discovery was made what did you do?

"A. Well, I came into town here and I think recorded the ground.

"Q. What else was done at the time, Mr. Cook; had anybody else entered on that group?

"A. Yes, I think Klonos had entered on the ground and I forbid him and then I came in here and spoke to Barnette about it. And there was action fetched then.

"McGINN—Q. That's when you saw me, was it?

"A. Yes sir.

"Q. That action was brought about the 20th of April, 1905?

"A. Something about there. . . .

"Q. Do you know what if any arrangements Captain Barnette had with McGinn and Sullivan at that time?

"A. Not at all, no sir.

"Q. You weren't concerned with that?

"A. No" (Tr., 299).

Barnette fixes the time as that when Cook and Ridenour thinking that it was necessary to do more work on the ground in the way of putting down additional holes and cross-cuttings (Tr., 88) than they had agreed to do in the first instance in connection with the making of the location (for which they were to receive their original one-eighth interest), came in to see him, and he agreed to give them a further one-twelfth interest each for the doing of this additional work. There is no question that this was subsequent to the completion of the location (Tr., 170-171, 315, 316), and at or about the time of the institution of the litigation with Klonos, which bears out Barnette's further testimony that the agreement with McGinn and Sullivan was made after Klonos had "jumped" the ground, as he said he told them then, "The ground was in litigation."

There surely can be no dispute that the locators of this claim, after the same had been completed by marking and discovery, would have been at perfect liberty to have sold or disposed of their entire interests in the claim or have disposed of the greater portion thereof to lawyers as a consideration for defending the location in court. So if we are to believe the testimony relative to when the agreement was made with McGinn and Sullivan, which is uncontradicted, that agreement could have no effect upon the validity of the location under the law.

The only other evidence that went to the point that some one was to get more than he was entitled to

under this location was that of Barnette, who never testified to any direct arrangement, understanding, agreement or promise on the part of the six other locators whose powers of attorney he held, but who said he *expected* to get a half interest from those six, based upon the fact that he wrote one of the locators, stating that if they sent powers of attorney, he would stake for them, and *look after the ground* and that he would *expect* a half interest in each interest therefor, not for the *staking* alone, but for *looking after the ground,* which would be a valid consideration for the interest to be transferred *after* the location was completed (Tr., 71).

Says Barnette when asked with reference to the management of the Dome Group claim,

> "Q. Who has the management? . . . Ridenour and Cook, McGinn and Sullivan and the parties I represent as their agent. Q. And yourself?
>
> "A. I have no interest in it yet *I am in hopes of having* . . .
>
> "Q. Don't you have anything to say in the management of the claim in respect to the plaintiffs, as to your half interest under your powers of attorney?
>
> "A. Not legally, I haven't.
>
> "Q. In point of fact, do you have anything to do with the management of the claim under the plaintiff's title?
>
> "A. No, *not until I get my share from them.*

"Q. You never have had anything to do with it?

"A. *Not legally, I have not.*

"Q. What do you mean by qualifying it that way?

"A. *I have furnished the supplies and expect to get my half interest from them all"* (Tr., 81-82).

And in line with his *looking after the ground* as he stated to his brother-in-law, he *furnished the supplies* and for that reason expected to get his half interest therefor.

"Oft expectation fails and most oft there where most it promiseth." At the time of the Cook-Klonos trial expectation was all that Barnette then had, still holding the powers of attorney unrevoked of the six locators (Tr., 156-7), and that condition remained unchanged at the trial of the case at bar so far as the record shows.

"Q. Have you ever received any transfer or deed of conveyance of any kind or description from any of those persons transferring or conveying any interest in the Dome Group claim to you?

"A. Not yet.

"Q. Or to any other person for you?

"No (Tr., p. 88).

And again:

"Q. So at the present time the plaintiffs, Cook and Ridenour are entitled to a one-third interest in the property, McGinn and Sullivan are en-

titled to one-third interest in the property and you are entitled to one-half of what the plaintiffs held as agent for them in acquiring this property.

"A. I am in *hopes* of getting half. *I don't own it yet . . .*" (Tr., 93).

"Q. Have you any interest in the Dome Group claim at this time?

"A. No sir.

"Q. Have you ever had any interest in it?

"A. No, sir" (Tr., 84).

For all of these reasons we submit, the court below was right in refusing to withdraw the Dome Group defense from the jury. The latter were the judges of the facts and the court could not usurp the province of the jury in that regard. It was its duty to submit all of the evidence to the jury, applying the principles of law laid down in *Cook* vs. *Klonos* (*supra*) so far as they were applicable, admitting (which we do not) that the plaintiffs in error had any power to question the validity of the Dome Group location on the only grounds they have advanced, viz: the fraud against the government.

When Rooney attempted to initiate his location, Cook and Ridenour were in possession of the ground, having a shaft down within 50 or 75 feet of their tent (Tr., 177). If the location were voidable as to any of the eight locators who were interested with Cook and Ridenour in the ground, by reason of any fraudulent intent, surely Cook and Ridenour being absolutely in-

nocent of connivance in the fraud, if any, were entitled to hold at least the ground upon which they were living, together with their works, the location at that time being not void, but voidable under the very decision relied upon by plaintiffs in error.

This Court held in that case that it was only where "ALL *the locators had knowledge of the concealed interest and were parties to the transaction* that the location was void" (164 Fed., 539). Holding on the motion for a modified judgment that it was not void as to Cook and Ridenour because of their innocence of any wrong (168 Fed., 701).

Therefore until it had been affirmatively decided that the Dome Group location was void for the reasons urged, the location being marked so that its boundaries could be readily traced and a discovery having been made thereon, and furthermore the innocent locators being actually in possession, no right could be initiated by an intrusion within the boundaries of the claim, and particularly within that portion thereof in the actual occupation of Cook and Ridenour.

But only the government can question the validity of a location on such grounds.

The special instruction complained of under counsel's first point is as follows:

> "And since no valid selection has been made by any of the Dome Group locators, you are not authorized to find a verdict in favor of the defendants, by reason of the Dome Creek location, *if you* find

from the evidence that there was any agreement or understanding between *any* of the locators and E. T. Barnette, that said Barnette should own more than twenty acres of said Dome Group Association claim, provided that such agreement or understanding was made or entered into prior to the consummation of said association location."

Counsel claim that beginning with the word "if," the court submitted to the jury "the determination of a fact as to which the evidence was all one way."

We confess we cannot see what evidence was all one way, unless it was that there had been no actual agreement with any of the locators of the ground with E. T. Barnette who was not a locator. That the record shows to be a fact. From our point of view the court erred in favor of the plaintiffs in error when it left this evidence to the jury. It should have granted defendant's motion for a directed verdict (Tr., 323) for even conceding *pro argumenti* that there might have been some understanding between Barnette and the six other locators, by which Barnette was to have one-half of what they were to get out of the ground, that was a question which concerned the government only, and could not be raised by a third party who does not question the validity of the location in other respects.

The effect of the decision of this Court in the case of *Cook* vs. *Klonos* (*supra*) is that such a location is voidable only.

That being the case, the question of its voidability is

one for the government alone in a case where the government is a party.

This proposition is similar to that of an alien location. While under Section 2319 of the Revised Statutes only *citizens* or those who have declared their intention to become such can *locate,* yet the law has been settled by the courts that only the government can on "office fraud" question the validity of a location made by an alien.

McKinley Creek Min. Co. vs. *Alaska United M. Co.,* 183 U. S., 563;
Manuel vs. *Wolff,* 152 U. S., 505;
Costigan on Mines, 167-8;
Morrison's Mining Rights, 13th Ed., 308;
Lindley on Mines and Mining, Vol. 1, Sec. 233;
Snyder on Mines, Sec. 263;
Shamel on Mining, Mineral and Geological Law, p. 108.

Furthermore, the principle controlling in the alien cases which we contend applies here has also been adopted in a class of cases arising under the National Banking Act, where the national banks have been held entitled to recover upon securities taken in the ordinary course of business but in violation of the express provisions of the Act of Congress creating them. In this class of cases the Supreme Court has uniformly held

that such securities are not void but voidable, *and the sovereign alone can object thereto on "office found."*

National Bank vs. *Matthews,* 98 U. S., 621, 627;
Oates vs. *National Bank,* 100 U. S., 239, 249;
National Bank vs. *Whitney,* 103 U. S., 102-3;
Reynolds vs. *Bank,* 112 U. S., 405;
Schuyler National Bank vs. *Godsen,* 191 U. S., 451.

This same principle is also involved in another class of cases wherein by statute foreign corporations are forbidden to do business in a state unless they have complied with certain statutory requirements. The Supreme Court has held that *No one can question the validity thereof except the state upon a direct proceeding for that purpose.*

Fritts vs. *Palmer,* 132 U. S., 282;
Seymour vs. *Slide,* 153 U. S., 523.

It has also been held that where a corporation violates the statute with regard to holding a specified amount of real property in order to enable it to carry on business, no private individual can take advantage of the fact in collateral proceedings, *the matter being one of which the state alone can complain.*

Conell vs. *Springs Co.,* 100 U. S., 55, 60;
Jones vs. *Habersham,* 107 U. S., 174;
Blair vs. *City of Chicago,* 201 U. S., 400.

See also that class of cases involving the throwing open to occupation and entry by the citizens of the United States of certain public lands to settlers on a certain day and hour, and wherein the proclamation declaring such lands open to settlement contains an express prohibition against any sooner entry, under penalty of loss of right to acquire *any right* to said lands. Yet the Supreme Court has upheld locations made by individuals who violated the express provisions of the statute by entering before the hour stated, and held that while the entry of one so disqualified *was valid on its face, no one but the government through its land department could question the entry.*

McMichael vs. *Murphy,* 197 U. S., 304;
Hodges vs. *Colcord,* 193 U. S., 192.

See also,

Weher vs. *Spokane,* 64 Fed., 208;
Sanders vs. *Thornton,* 97 Fed., 863;
Brown vs. *Schlerer,* 118 Fed., 987;
Blodgett vs. *Lanyon Zinc Co.,* 120 Fed., 893;
Waterbury vs. *McKinnon,* 146 Fed., 737-9;
Dunlop vs. *Mercer,* 156 Fed., 545.

We have had occasion to take a case of a similar nature from this Court to the Supreme Court of the United States, where the question of the right of any one other than the government to question a location made by a deputy mineral surveyor in alleged viola-

tion of Section 452 of the Revised Statutes of the United States, is the main question involved. This Court held that such a location could be attacked by private individuals, but the Supreme Court of the United States issued the writ of certiorari therein. We refer to the case of *Hammer* vs. *Waskey,* now pending, No. 84, Supreme Court Calendar.

For this reason alone we maintain that if the Court in refusing to withdraw the defense of the Dome Group from the jury because of the reasons urged by counsel, erred, it erred in favor of plaintiffs in error and no prejudice resulted therefrom.

II.

The Court below could not have done otherwise than allow the Stafford title to go to the jury.

Counsel assert three things with reference to the Stafford title:

(1). Hastings had nothing to convey to Stafford;

(2). Stafford never having taken possession nor marked his boundaries had nothing to convey to defendants;

(3). No discovery was made by either Hastings or Stafford or by any one for them.

We will consider these objections seriatim.

(1). There is evidence that the Hastings location was staked on January 2nd, 1904. A location notice

was recorded on March 24, 1904, reciting that the claim was discovered on January 2, 1904, and located on that date (Tr., 225), U. G. Hastings being the locator.

Stafford, whose testimony is absolutely uncontradicted, says that he was out on the claim in July, 1904, and while looking at the location of the claim saw the lower and center stake on which was written as far as he could remember "Lower end stake No. 3 First Tier." That he had no difficulty in following a blazed line from there to the northwest corner stake of the claim. He then went up the creek between Three Creek Claim and Three First Tier along a blazed trail which extended up as far as Two Below Creek Claim. There he saw corner of Three First Tier and Three Creek claim. On one of these stakes was written Corner stake of Three First Tier (Tr., 194-195).

In September of the same year he obtained an option to purchase the claim from the agent of Hastings, the locator William Woodward (Tr., 200), through Geo. Roth, his attorney in fact. This option was to continue in force for one year from its date, September 2, 1904, during which time Stafford had a right to purchase the claim for $250. After the signing of this option Stafford again went out on the ground late in September. Before going out on the claim and before entering into the option to purchase the ground, some talk was had between Stafford and Woodward as to whether a discovery was made on the ground. As Stafford says:

"Woodward told me that I had better go out,

and there was a gulch on the lower end of the claim, and make a discovery myself, as he didn't understand really what a discovery was. There was some question at the time about it,—he said go and satisfy yourself" (Tr., 204).

With this authorization and with the desire to again examine the boundaries Stafford went out on the ground. He testifies to seeing at this time, the upper center stake, describing it, on which *was a location notice written there and signed by U. G. Hastings.*

The witness says:

"The stake it was—'I claim 1320 feet down alongside of Creek claim No. 3 by 660 feet wide for mining purposes' signed by U. G. Hastings." . . . "The date was on it, the date I think was January 2nd, 1904" (Tr., 206).

The witness further testified that the writing on this location notice was the same as in the recorded notice. The language is practically identical (Tr., 206). After seeing this upper center stake Stafford followed a blazed line across to the Southeast corner, a distance of about 300 feet, and saw a good substantial stake there on which was marked "Corner stake of No. 3 First Tier." Then following a well blazed line from that corner he went down to the northeast corner, where was also a stake four or five feet from the ground with "Corner Stake No. 3 First Tier" written on it, also marked with an arrow pointing

toward the center stake. There was a blazed line between this northeast corner stake and the lower center stake, and following that Stafford reached the lower center stake which he had seen in July of the same year, on which was written "Lower Center Stake of No. 3 First Tier" and he thinks Hastings' name was signed to it (Tr., 208-9). Following the blazes down hill, he reached the downstream northwest corner where there was a stake, a tree cut off, the same stake he also saw at this point in July. Then he went back to the lower center stake, and from there up the line between the creek claim and the first tier of benches, along a blazed line to the upper corner or southwest corner stake. This too was the same stake he had seen in July on which was written as near as he could recollect "Corner stake of No. 3 First Tier" with arrows pointing up hill to the center stake (Tr., 210-211).

From this testimony there can be no doubt that the claim was properly marked and Stafford testified that from these stakes, writings and blazed lines, there could be no question that a prospector in good faith, searching to determine the boundaries of the claim, could readily have determined the location by tracing these boundaries. He had no trouble whatever (Tr., 211).

Stafford further testified that while out on the ground in March, 1906, he discovered that the northeast corner stake had disappeared and he set a tem-

porary stake there. A few weeks later he went out on the ground with Woodward and a surveyor, and Woodward pointed out the upper center stake on which was the same writing that Stafford had seen there in July, and September, 1904; also the Southeast corner stake, on which part of the writings had been obliterated and other markings placed thereon; this stake also was the same stake seen by Stafford in 1904, although other parties had blazed along there and obliterated a portion of the writings. Woodward then pointed out the stake at the Southwest corner, also the northwest corner stake and the lower center end stake, which stakes Stafford had seen in June and September, 1904 (Tr., 250-4), and then they went up the hill and established a permanent Southeast corner stake in place of the temporary one placed there in March, 1906 (Tr., 255).

These then were the clearly defined boundaries which indicated the Hastings location when Stafford entered into the option to purchase the same. There is no direct testimony that when the option was entered into there had ever been an actual discovery made on the ground by or for Hastings. That is somewhat in doubt, although the testimony of Stafford shows that there had very likely been a discovery made, its character being somewhat in doubt, as Woodward said he "didn't understand what a discovery was," and so authorized Stafford to go on the ground as his agent,

pending the exercise of the option to purchase and make a discovery and satisfy himself.

But waiving all question of discovery aside, and answering the proposition of counsel that Hastings had nothing to convey, we submit that there was no actual conveyance made in the case until after a discovery had been made within the limits of the claim by Stafford for Hastings.

The original agreement between the parties was simply an option given to Stafford to purchase within a specified time, all the rights of whatever nature, Hastings had in the ground. Until Stafford exercised the option to purchase the title to the ground, whatever the nature of that title might be, remained in Hastings.

There can be no doubt that pending the intervention of adverse rights, one who locates by staking a piece of ground in accordance with the statute, but who has not as yet made a discovery, has an inchoate right to the ground staked which may be lost by the peaceable entry upon the ground of one who is seeking to make a valid location thereon completed by discovery. We are not unmindful of the fact that discovery is the essential requisite to establish a valid claim to a piece of mining ground of the United States, but whether discovery is made first or after the marking of the boundaries is non-essential in the absence of intervening rights.

"The marking of the boundaries may precede

the discovery or the discovery may precede the marking, and if both are completed before the rights of others intervene, the earlier act will inure to the benefit of the locator."

Lindley on Mines, Sec. 330;
Jupiter M. Co. vs. *Bodie M. Co.,* 11 Fed., 666;
North Noonday M. Co. vs. *Orient M. Co.,* 1 Fed., 522;
Erwin vs. *Perigo,* 93 Fed., 608;
Thompson vs. *Spray,* 72 Cal., 528;
Miller vs. *Chrisman,* 140 Cal., 444.

The case of *Miller* vs. *Chrisman,* cited, recognizes certain rights in the locators of a claim, under such conditions, i. e. where the ground is staked only, and holds that such rights may be validly transferred before discovery.

Says the Supreme Court of California, referring to the contention of certain parties therein:

"Stating the proposition in a sentence it is this: Where a location is made by associates, those associates have no right or title which they can convey before the location is perfected by discovery, and their attempt to convey results in an abandonment of their claim and in the destruction of the whole location. It sufficiently appears from what has heretofore been said that a location such as this, made by eight associates is but a single location, each associate having an undivided one-eighth in the whole. *It further appears that cer-*

tain valuable rights became the property of such locators even before discovery. They have the right of possession against all intruders . . . and they may defend this possession in the courts. . . . They have then this right of possession and with it the right to protect their possession against all illegal intrusion and to work the land for the valuable minerals it is thought to contain. We cannot perceive why these rights may not in good faith be made the subject of conveyance by the associates as well before as after discovery. There is certainly nothing in the expressed law upon the subject to lead to the view that this cannot be done and there is much to give countenance to the contrary connection."

The doctrine of *Miller* vs. *Chrisman* in this regard was affirmed in the later case of *Merced Oil Mining Co.* vs. *Patterson,* 153 Cal., 624, where a conveyance of a specific portion of an association claim to an outsider before discovery, was sustained, the discovery on the portion granted being held not, however, to inure to the benefit of the rest of the claim in the absence of any agreement to that effect, distinguishing *Chrisman* vs. *Miller* in that the latter was a transfer as between the associated locators.

We think these cases establish on the part of Hastings a right to convey his possessory right to Stafford before a discovery, there being no adverse intervening rights, and are a sufficient answer to that point of counsel, were that law or the law in the cases cited in op-

position thereto in plaintiffs in error's brief, applicable to the facts here.

But as we have stated, no conveyance of the rights of plaintiffs in error was actually made until long after Stafford as the agent of Hastings had made a discovery on the ground.

When Stafford entered into the optional agreement with Hastings to purchase the ground in September, 1904, he recognized the rights of Hastings therein. While it may be true, if Hastings were not in the actual possession of the ground either in person or by agent at the time of this agreement, any third party might have entered peaceably on the ground for the purpose of making a discovery and completing a valid location, as a matter of fact no one did so enter and it is immaterial that no actual possession was shown on the part of Hastings at that time. Stafford was willing to purchase the Hastings location as it stood if he could assure himself that the ground contained mineral and Woodward being doubtful of a discovery gave Stafford the right to go out and see for himself whether it did or not.

And this brings us to the second and third propositions made by plaintiffs in error, that Stafford had never taken possession or marked the boundaries or made a discovery and could convey nothing by the deed to Crawford *et al.* of a three-fourths interest in the ground for $2,000 in September, 1905 (Tr., 232), or of a quarter interest in December, 1906, to one

Aitkin for ten thousand dollars (Tr., 234-5), which interests afterwards vested in the defendants in error herein (Tr., 236-239-241).

We will discuss these together.

Counsel devote considerable space in their brief to a discussion and criticism of the making of the original Hastings location, maintaining that it bore the marks of a "professional staker." What counsel means by a "professional staker" is not clear to us viewed from the facts of this record. There is no other location shown to have been made for Hastings than the one in controversy, and the circumstances surrounding that are not at all unusual. Hastings and Roth were partners, and Hastings testified that he authorized Roth to enter into a grub stake agreement with Woodward relative to the staking of claims; that he paid part of the money for the grub staking, leaving money with his partner when he went outside in 1903 to meet the demands thereof and that his partner afterwards accounted to him therefor (Tr., 287). The ground was staked in his name and he approved of all the actions of Roth and Woodward and accepted his proportion of the money that was paid for the claim by Stafford (Tr., 276).

There is nothing in the statute of the United States which prohibits the making of a location by an agent. In fact many of the claims located in Alaska as well as in many of the mining states and territories are made through the agency of others.

It has been held so many times by the courts that locations may be made by agents that it is laid down as a principle of law in the text books.

Says Lindley:

> "There is nothing in the revised statutes that prohibits one from initiating a location of a mining claim by an agent. As the title comes from appropriations made in accordance with the law, and as it is not necessary that a party should personally act in taking up a claim, *or in doing the acts required to give evidence of the appropriation, or to perfect the appropriation, it would seem at* least in the absence of a local rule or state statute to the contrary, that such acts are valid if done by one for another or with his assent." Vol. 1, Section 331.

Book vs. *Justice M. Co.,* 58 Fed., 108;
Murley vs. *Ennis,* 2 Colo., 300;
Schultz vs. *Keller,* 13 Pac., 481;
Gore vs. *McBrayer,* 18 Cal., 583;
McCullock vs. *Murphy,* 125 Fed., 147;
Rush vs. *French,* 25 Pac., 816.

There is no merit in Counsel's contention as to the character of the original authority to Woodward to stake for Hastings. There being some question as to the same not having been completed by discovery and Stafford recognizing the rights of Hastings in the ground, he was willing before he paid out money for

an interest in the ground to investigate the mineral character thereof for the benefit of the Hastings location. No other construction can be placed upon his conduct. He went out on the ground and made a discovery of mineral in September, 1904, and again in June, 1905. It is logical to suppose that had he intended to treat this discovery as inuring to his benefit and the initiation of a location for himself he would have gone ahead and marked new boundaries or indicated that these boundaries were adopted by him. What did he do? He went to the Hastings people and exercised his option to purchase, thereby demonstrating two things, first that he was acting as the agent of Hastings when he did this act to *"perfect the appropriation"* of Hastings, and secondly that he believed the ground was mineral by reason of this discovery and so decided to conclude a sale with Hastings for the same.

There was therefore no necessity for doing any act to show the adoption of the stakes.

On the other hand, treating the discovery as Stafford's, he adopted the stakes of Hastings when he took the option on the ground and thereafter purchased the ground embraced within those stakes on September 8th, 1905, prior to any discovery by plaintiffs in December, 1905.

Conway vs. *Hart,* 129 Cal., 480.

No posted notice of location is required either under the general mining law or under the law controlling in Alaska. He had no call therefore to either post or record any notice of the claim, which was clearly and distinctly marked on the ground so that its boundaries could be readily traced.

Full notice of the rights of Stafford therein were given long before discovery made on the ground by plaintiffs in error, as the deed from Hastings was on record on September 23, 1905, two days after the plaintiffs entered to stake it is true but *three months* before any location had been perfected by them by a discovery.

There is no showing of any adverse rights up to the 21st day of September, 1905, when it is admitted Rooney staked. No claim is made as to any discovery by him or his associates until about Xmas, 1905.

STAFFORD DISCOVERY.

But counsel argue that there was no sufficient discovery made to support the Hastings location; as a matter of fact, his objection going to the amount of mineral found.

Stafford testified with reference to a discovery that he panned in a gulch some fifteen feet deep at the lower end of the claim, in September 1904, just after having made his arrangement with Woodward; that he had a gold pan with him, and a pick and shovel, and panned in this gulch in several places and found particles of

gold. That the gold was all fine gold with one exception—that he found a small piece of quartz containing a coarse particle of gold there the size of a pea or a piece of wheat (Tr., 212-215). That he was out there again in June, 1905, and panned again in the same gulch and again found colors of gold (Tr., 218). It also appeared that about this time pay gold had been discovered on surrounding ground in the immediate vicinity of the claim, above and below it, and also within about 400 feet of this gulch where he had discovered this gold and about 100 feet from the northeast corner of the claim (Tr., 217-224).

The witness testified in response to a question, that the finding of these colors in the gulch within the boundaries of the claim, taken in connection with the location of the property with reference to the fact of this discovery of gold above and below the claim in paying quantities, and the finding of pay gold in a shaft about 100 feet (Tr., 221) from the northeast corner of the location would have justified him as a prudent man in going ahead and spending money on the development of the ground (Tr., 224).

Afterwards he leased the ground in the first part of September, 1905, to Tracy Hope, and in October of 1905 gave a lay to Ness and Weimer, who proceeded to develop the ground under these lays.

Hastings, who had been a miner in Alaska for twelve years, testified also in response to a similar question that he would be justified in spending money on the prop-

erty in the hopes of developing a paying mine (Tr., 278). This testimony stands uncontradicted.

The question of what constitutes a discovery as between two mineral locators is more liberal than as between a mineral locator and an agricultural claimant, as the question between the former is simply that as to who is entitled to priority.

Chrisman vs. *Miller,* 197 U. S., 313;
Lange vs. *Robinson,* 148 Fed., 799.

Priority is conceded to Hastings here. And as to whether his discovery was sufficient in its nature to form the basis of a location is a matter of fact for the jury.

Iron Silver Co. vs. *Mike & Starr Co.,* 143 U. S., 394;
Lange vs. *Robinson, supra.*

Says Judge Hawley in *Book* vs. *Justice Mining Co.,* 58 Fed., 106:

> "When the locator finds rock in place containing mineral, he has made a discovery within the meaning of the statute *whether the rock or earth is rich or poor, whether it assays high or low.*"

And again in the case of *Bonner* vs. *Meikle,* 82 Fed., 697, 703, says the same judge:

> "It was never intended that the courts should *weigh scales* to determine the value of the mineral found as between a prior and subsequent locator of a mining claim on the same lode."

See also,

Lange vs. *Robinson,* 148 Fed., 799;
Migeon vs. *Montana Cent. Ry. Co.,* 77 Fed., 249;
Erhardt vs. *Boaro,* 113 U. S., 536;
Nevada Sierra Oil Co. vs. *Home Oil Co.,* 98 Fed., 673;
Shoshone vs. *Rutter,* 87 Fed., 807;
Fox vs. *Myers,* 86 Pac., 793.

In *Erhardt* vs. *Boaro, supra,* the Supreme Court of the United States say:

"There must be something beyond a mere guess on the part of the miner to authorize him to make a location which will exclude others from the ground, *such as the discovery of the presence of the precious metals in it, or in such proximity to it as to justify a reasonable belief in their existence.*"

In *Shoshone* vs. *Rutter, supra,* this Court say:

"The seams containing mineral bearing earth and rock which were discovered before the location was made, were similar in their character to the seams or veins of mineral matter that had induced other miners to locate claims in the same district, which by continued development therein had resulted in establishing the fact that the seams as depth was obtained thereon, were found to be a part of a well defined lode or vein containing ore of great value. *The discovery made at the*

time of the Keely location was therefore such as to justify a belief as to the existence of such a lode or vein within the limits of the ground located."

But the case of *Lange* vs. *Robinson,* cited, is a late expression of this Court upon the point of what constitutes a sufficient discovery and is we think controlling herein, arising in the same mining district, that of Fairbanks, as the case at bar.

There a few colors were found in the muck a few feet from the surface; but it was shown that the claim, like the one at bar, was situated with reference to other paying gold locations, and in sustaining the validity of such a discovery, this Court say:

"The question of discovery is in every case one of fact for the court or jury. . . . There must be some gold found within the limits of the land located as a placer gold claim, but it cannot be said in advance *as a matter of law* how much must be found in order to warrant the court or jury in finding that there was in fact a discovery such as the law requires. *The question must be decided, not only with reference to the gold actually found within the limits of the claims located, but also with reference to other lands known to contain valuable deposits of placer gold* and whether its rock and soil formation are such as is usually found where these deposits exist in paying quantities. . . ."

Then after stating the liberality rule between mineral claimants, this Court goes on to say:

> "There was an actual discovery of gold upon each of the claims located. They *are situated near other lands presenting the same surface indications, which at the date of the location of these claims were known to be valuable for the placer gold which they contained,* and these facts according to the uncontradicted testimony of plaintiff and that of the witness Field above quoted, were sufficient to justify the expenditure of money for the purpose of their exploration with the reasonable expectation that when developed, they would be found valuable as placer claims."

In conclusion upon this point we submit that the jury are the judges of the effect and value of the evidence.

Sec. 673, Part IV, Alaska Code.

And the Court would have invaded their province if it had granted the motion of plaintiffs in error.

We further submit that the points made herein are equally applicable to the refusal of the Court to direct a general verdict for plaintiffs as asked for by them. Where there is any evidence to support a verdict on any of the issues, it would be error for the Court to grant such a motion.

Section 238, Part IV, Carter's Code.

III.

Counsel's next point is relative to instructions numbered V and VI.

These instructions are as follows:

> "The first affirmative defense under which the defendants claim title to the ground in controversy is made under and by virtue of what is known and styled in the answer as the Dome Group Association claim, which it is conceded includes the property in controversy.
>
> "You are instructed that the undisputed evidence shows that at the time of the entry of the plaintiffs upon the ground in controversy, the Dome Group Association Claim had been located and a discovery of gold had been made within the limits of that claim; but the plaintiffs contend that the Dome Group Association Claim is void for the reason, as claimed by the plaintiffs, that the locators of said association claim had agreed among themselves prior to the location thereof, that one E. T. Barnette was to be the owner of and entitled to the possession of an undivided one-third of said associated placer claim.
>
> "You are instructed that sections 2330 and 2331 of the Revised Statutes of the United States provide as follows: . . .
>
> "You are further instructed that if any arrangement or understanding was had between E. T. Barnette and the other locators of the Dome Group Association Claim whereby the said Barnette was to acquire an interest in said association claim in excess of twenty acres, provided such

understanding or agreement was entered into before the location of said association claim, would render the said association claim void as to the said Barnette and all the other locators who participated in the understanding or agreement whereby said Barnette was to acquire such interest in said association claim, and said claim would be also void as to all of the locators who had knowledge that said Barnette was to acquire a greater interest in said association claim at or prior to the consummation of said Dome Group Location.

"But you are instructed that in order that such an agreement may avoid the Dome Group Association location, you must find that such agreement was entered into prior to the consummation of the location of Dome Group Association; for after such association was located according to law—that is, by the marking of the boundaries so that the same could be easily traced and the discovery of gold within the exterior boundaries sufficient in law, as you will be hereinafter instructed, whatever agreement might take place between the locators or between the locators and any other person or persons after the consummation of such association location, can not affect the validity of such location provided the same was valid when located. In other words, an association location may be avoided by any agreement whereby one of the locators or other person or persons is to acquire an interest therein greater than twenty acres, provided such agreement is entered into prior to the consummation of the location. Any agreement between the locators or between any

of the locators and others subsequent to a legal location can not affect the validity of such association location.

"You are further instructed that if any of the locators of the Dome Group Association entered into any agreement or any understanding with E. T. Barnette whereby the said Barnette was to acquire or become the owner of a greater interest in said association claim than twenty acres, then said location is void as to all who participated in such agreement or understanding, and as to all of such locators who had knowledge of such agreement or understanding prior to said location."

These instructions are based upon the decision of this Court in the case of *Cook* vs. *Klonos,* 164 Fed., 329, and as modified in 168 Fed., 701, and applied the principles of law enunciated in that decision.

Counsel assert that the Court below erred in telling the jury in these instructions that the invalidity or validity of the claim is dependent upon a knowledge by *all* of the locators of the fact that by such location Barnette was to acquire more than twenty acres.

But that is exactly the law as laid down by this Court in the first decision in the case cited.

There this Court held the claim void because, as it asserted, *"when all the locators* had knowledge of the concealed interest and were parties to the transaction it renders the location *void."*

But where, as they afterwards found, some of the locators were innocent of knowledge of any fraud,

then the location was not void, but only voidable as to the parties participant in the fraud, if any, but valid as to the others. In other words the location is void under one set of circumstances and voidable under another.

Viewed from the standpoint of this decision no complaint can be made of the instructions of the Court below in this regard. There is no confusion in these instructions. The Court first applies the doctrine to the Barnette interest as follows:

(1) If any agreement or understanding was made *prior* to the location that Barnette was to have more than twenty acres between him *and the other locators,* the location would be void as to him and as to *all* these locators.

(2) If some locators, however, did not participate in such agreement or understanding but had knowledge of it, then it would also be void as to them.

(3) That any such agreement or understanding must be shown to have been made prior to the location as any subsequent agreement or understanding to such effect could not affect the validity thereof.

(4) And then goes on to state the law in general terms: That an association location may be avoided, by any agreement *prior* to consummation of location, when as a result thereof one of the locators or any other person is to have an interest in excess of twenty acres, and that any agreement made subsequent thereto

as to such interest does not effect the validity of the location.

The Sixth instruction is possibly somewhat of a repetition of the Fifth instruction but contains no different idea.

In fact these instructions can not be complained of as they follow strictly the law laid down so recently by this Court in the cases cited, and could by no possibility have confused the jury.

So far as the rights of Rooney are concerned as influenced by the right of selection of forty acres given to Cook and Ridenour by this Court, he can not complain, for the Court below ruled out, erroneously, we believe, in plaintiff's motion, the Ridenour selection and Cook had as yet made none. And furthermore until the location had been declared void *in toto* or in part by this Court, it being admitted the same was bounded as required by law and a discovery made thereon, no rights could have been initiated by Rooney. It will be remembered that Rooney and his associates entered in September, 1905, while Cook and Ridenour were in the actual possession of the ground, long before any decision as to the validity of the claim and as the Dome Group location is only questioned because of the alleged excessive interest of Barnette (which, as we contend, was one for the Government alone to raise), no injury could have resulted to him as he and his associates merely "jumped" both this location and, as the evidence also shows, the Hastings location.

IV.

Counsel object to Instruction No. 4 of the Court (Tr., 336) which is as follows:

> "Before you can find a verdict for the plaintiffs, you must find by a preponderance of the evidence that at the time they entered upon the premises in controversy, and claim to have located the same as a placer mining claim, that the same was unoccupied, unappropriated public domain of the United States."

Counsel object to the use of the term "unoccupied," but that is the condition contemplated by the language of the statute.

> "All valuable mineral deposits . . . are hereby declared to be free and open to exploration and purchase and the lands in which they are found to *occupation* and purchase."
>
> Section 2319, R. S. U. S.

Counsel claims the giving of this instruction with a failure to define "unoccupied" taken in connection with Instruction XXVI wherein the Court instructed the jury that

> "it is immaterial what reasons actuated him (Rooney) to enter thereon and locate, so long as the ground included in his location was at the time of such entry unappropriated public domain of the

United States, that is, ground not covered by any prior valid subsisting location,"

constituted reversible error.

It is true that in almost every charge to a jury isolated sentences or words may be picked out which in themselves might be suspectible of some criticism. But that the charge of the Court must be taken as a whole has been too often laid down by the courts to need repetition here. In fact this Court in the very recent case of *Belsea* vs. *Tindall* (Sept. 5, 1911) express the rule as follows:

> "In examining the charge for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages, and to decide upon them, without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language of other parts of the charge. In short, we are to construe the whole, as it must have been understood, both by the Court and the jury, at the time when it was delivered." *Magniac* vs. *Thomson,* 32 U. S. (7 Pet.), 348, 389; *Evanston* vs. *Gunn,* 99 U. S., 660, 666, 668.

And we submit that these two instructions taken in connection with the entire charge, which nowhere bases any instruction upon occupancy alone, but upon what constitutes valid subsisting locations, cannot but be sustained.

So far from being inconsistent, these two instructions are when construed together perfectly in accord. The Court, bearing in mind the issues and the testimony regarding the various locations which in no instance is based upon actual occupancy but upon claimed valid locations, instructs in the language of the statute and then describes further what he meant by unoccupied, namely, not occupied or appropriated by a valid subsisting location. In line with this later instruction which practically explains the first, the Court refused to instruct as to the immateriality of whether the tent of Cook and Ridenour was on the ground in controversy or not.

The mere presence of that tent on the ground could have no significance one way or the other under the pleadings and proof. Furthermore, plaintiffs allowed testimony as to the existence of this tent and its position to go in without objection on their part as to its materiality (Tr., 177). It is too late now for them to object on that ground to have it go to the jury for what it was worth.

IV.

Counsel's last point is as to the error of the Court with reference to Juror Derby. This is another of the errors asserted by counsel which are without prejudice.

It appears that one Derby was called as a juror, and testified that he had been in Alaska for over six years; that he was a purser on one of the steamers and spent

eight months of the year in Alaska; that while there he considered himself a resident (Tr., 52), that he remained in during the winter of 1905-06 and voted in Alaska in Fairbanks; that he was employed under a yearly salary and as a rule spent the winter outside, like the major portion of the inhabitants of Alaska; and had no definite abiding place outside of Alaska, living in hotels in San Francisco and San Jose during the winters. Plaintiffs objected that he was not an inhabitant of Alaska and when the Court passed him for cause, peremptorily challenged him and in doing so exhausted their last peremptory challenge.

One O. H. Bernard was called to fill his place and counsel say in their brief that while his *voir dire* showed no grounds to challenge for cause, yet it developed facts which would have entitled them to exercise a peremptory challenge if they had not been exhausted. And for this reason assert that they were injured by the Court in passing Derby for cause, not because a disqualified juror sat, but because having exercised their last peremptory challenge, on Derby, they were compelled to accept a juror, qualified under the law, but whom they did not want.

As to whether or not Derby was an inhabitant of Alaska sufficient to do jury duty there can be no doubt under the conditions known to exist in Alaska. He was not a tourist, a temporary visitor or a mere sojourner in the District. He was employed at an annual salary to work in Alaska during the entire open season.

Like many of the inhabitants thereof, he having no business that would detain him in the District during the closed season went "outside" at that time but the major portion of the year, seven or eight months was spent in the District. He had never voted outside in years, not having been there a sufficient time to vote, but had voted in Alaska the winter he stayed in.

In fact the record shows that he had a residence in Alaska for the major portion of the time and deemed Alaska his residence while there.

The Standard Dictionary defines "inhabitant" as "one making his home or dwelling permanently in a place as distinguished from a lodger or visitor; a resident;"

And says further, *"The law recognizes various degrees of permanency of residence as constituting an inhabitant for legal purposes."*

The witness testified as follows:

"Q. Do you regard yourself as a resident of the District of Alaska?

"A. Well, *while I am here I do.*

"Q. Yes sir, as a matter of fact you spend the greater part of your time in Alaska?

"A. Yes sir, I do, seven or eight months in the year.

"Q. And do all of your work in Alaska?

"A. Yes sir.

"Q. Now isn't it true that during the winter months your business is shut down on account of the ice?

"A. Yes.

"Q. There isn't any necessity of your staying here and you go away to spend the winters?

"A. I go home, yes sir. . . .

"Q. Mr. Derby, you testified you lived in San Francisco?

"A. Yes sir.

"Q. Do you own a home there?

"A. No sir.

"Q. . . . when you call that your home, you make your home with some relatives or friends?

"A. I have folks down there. . . .

"Q. Have you a furnished room in the house there that you consider you own when you are there, for your exclusive use?

"A. Well I stay at the hotels principally there and with my folks at times, but I don't stay in San Francisco all the time. . . .

"Q. Where do you vote?

"A. I haven't voted outside in years. I haven't been there a sufficient time to gain a vote.

"Q. Do you vote in Alaska?

"A. Yes sir.

"Q. Where?

"A. Here in this town" (Tr., 52-53).

When Derby went out in the winter, he did so with the intention of returning as soon as it was possible under climatic conditions "spending the winter outside and coming in over the ice or by way of St. Michaels in the spring."

Residence results from a combination of intent and action. We submit that Derby by voting in Alaska, doing all his work and transacting all his business there

during the major portion of the year, by having no permanent home or domicile elsewhere, brought himself within the rule of inhabitancy sufficient to perform jury duty. If this were not so a third of the population of Alaska would be so incapacitated for there is a general exodus into the States when the ice begins to set in. The application to Alaska of a definition of what really constitutes an inhabitant thereof must be made in view of all the conditions there existant.

So far as the error if any, of the Court is concerned in passing Derby for cause, and thereby compelling plaintiffs to exhaust their peremptories on him, when they might have exercised a peremptory on Bernard, there is nothing in the record to show that they had any desire to exercise a peremptory upon Bernard or that they desired to challenge Bernard in any way or manner. To all intents and purposes the record shows that Bernard was deemed by them a perfectly competent and unbiased juror and as Derby was removed from the panel, and no complaint is made of any other juror it would appear that the plaintiffs had had a fair and impartial trial and even if the Court was wrong in its ruling (which we deny) that he was an inhabitant of Alaska, it is not ground for reversal.

The mere exhaustion of the legal number of peremptory challenges will not give to a complaining party a right to a reversal, *but that in addition he must show that an objectionable juror was impaneled owing to the want on his part of another peremptory challenge;*

or as it may be otherwise expressed, the complaining party must have made or offered to make a challenge to a juror subsequently called.

Wooten vs. *State,* 99 Tenn., 189; 41 S. W., 813;
Spies vs. *People* (Ill.) 3 Am. St. Rep., 320; 122 Ill., 1;
Holcomb vs. *State,* 8 (Lea), Tenn., 419;
Fleeson vs. *Savage Silver M. Co.,* 3 Nev., 157;
State vs. *Raymond,* 11 Nev., 98;
Huecke vs. *Milwaukee City R. Ry. Co.,* 34 N. W., 243;
Carthaus vs. *State,* 47 N. W., 13.

The case of *Wooten* vs. *State,* 41 S. W., 813, is a very clean cut statement of this rule. This was a trial for murder and objections were made as to the rulings upon the competency of jurors peremptorily challenged by defendant. The Supreme Court of Tennessee in considering these objections states as follows:

"Certain persons summoned as jurors, answered on preliminary examination that they had read newspaper accounts of the homicide and from those accounts had formed an opinion touching the guilt or innocence of the defendant. By reason of that opinion, those persons were, by the defendant, challenged for cause; but the Court ruled that they were competent, and thereupon the defendant challenged them peremptorily, and they were excusd from service. Before the jury was completed, and while 11 jurors were being selected, the defendant exhausted

all of his peremptory challenges. Afterwards J. B. Dunning was 'accepted as juror by the state and defendant,' and became the twelfth member of the jury, without objection or challenge. The defendant now insists that the proposed jurors, who had formed an opinion, were disqualified, and that the trial judge was in error when he ruled that they were competent, and thereby compelled him either to accept them, or spend peremptory challenges to avoid them. The state replies that the defendant can not raise that question on his record, because he did not, after the exhaustion of all his peremptory challenges, also challenge, or offer to challenge, Dunning, but 'accepted' him without objection. It has long been settled that a defendant in a criminal prosecution must exhaust all of his peremptory challenges at the trial below, as was done in this case, before he can, in this Court, question the ruling of the trial judge as to the competency of persons presented as jurors (*McHowan* vs. *State,* 9 Yerg., 193; *Carroll* vs. *State,* 3 Humph., 317; *Henry* vs. *State,* 4 Humph., 270; *Preswood* vs. *State,* 3 Heisk., 468; *Griffee* vs. *State,* 1 Lea., 44; *Holcomb* vs. *State,* 8 Lea., 420; *Taylor* vs. *State,* 11 Lea., 721; *Hannum* vs. *State,* 90 Tenn., 649; 18 S. W., 269); but no case is recalled in which it has been distinctly decided whether or not the defendant, after exhausting his peremptory challenges must go further, and make, or offer to make, another challenge to entitle him to a review of that ruling. Some of the opinions in which the competency of jurors has been considered by this Court recite that the defendant exhausted all of his peremptory challenges without

saying whether or not he thereafter made, or offered to make, another challenge. Of this class are *Moses* vs. *State,* 10 Humph., 456; *Moses* vs. *State,* 11 Humph., 233; *Alfred* vs. *State,* 2 Swan., 581; *Major* vs. *State,* 4 Sneed, 600. Other opinions wherein the question of competency has been adjudged mention the exhaustion of peremptory challenges, and also the additional fact that a further challenge was made. *Eason* vs. *State,* 6 Baxt., 468; *Conaster* vs. *State,* 12 Lea., 438; *Woods* vs. *State,* 99 Tenn., 182, 41 S. W., 811. The latter fact was given the prominence of an essential in the last case, though it was not in terms adjudged to be so. In Holcomb's case the Court said: 'It is well settled that, unless the prisoner is forced to accept other jurors after exhausting his challenges, the question as to the competency of the jurors challenged can not be made.' 8 Lea., 419, 420. This has been understood to mean that the defeandant must make the subsequent challenge, or offer to do so; and we deem this the proper rule. The true object of the challenge, peremptory and for cause, is to enable the parties to avoid disqualified persons, and secure an impartial jury. When this end is accomplished, there can be no just ground of complaint against the ruling of the Court as to the competency of jurors. In the present case all of those alleged to be incompetent were rejected upon peremptory challenges, and therefore did not participate in the trial; and no objection, peremptory or for cause, was made to any juror selected. Dunning, the only one selected after the defendant had exhausted his peremptory challenges, was 'accepted' by both sides without ob-

jection from either. No one of the jurors actually trying the case appears to have been objectionable or disqualified. Consequently, all of them are presumed to have ben unobjectionable and qualified. This being so, it would avail the defendant nothing to show, if he could, that some of those rejected upon his peremptory challenges were incompetent, and for this reason the Court would not perform the vain task of deciding the question for him. It would be otherwise if the required use of peremptory challenges against those persons had deprived him of the attempted employment of such challenge against objectionable persons subsequently presented, and placed on the jury over his objection. Thompson says the better view is that, to entitle a defendant to relief against the ruling of the trial court in relation to the competency of a proposed juror, it must appear, 'not only that his peremptory challenges were exhausted, but (also) that some objectionable person took his place on the jury, who otherwise would have been excluded by a peremptory challenge.' Thomp. Trials, Sec. 115. In the case of *Railroad Co.* vs. *Herbert,* the Supreme Court of the United States refused to consider the competency of a challenged juror, because whether he was competent or incompetent, the jury trying the case appeared to be impartial, and the complaining party was entitled to nothing more. The Court in deciding the point, said: 'A competent and unbiased juror was selected and sworn, and the company had therefore a trial by an impartial jury, which was all it could demand.' 116 U. S., 642; 6 Sup. Ct., 590. The same Court, while treating the

same subject in a criminal prosecution, said: 'The accused can not complain if he is still tried by an impartial jury. He can demand nothing more. Id. The right to challenge is a right to reject, not to select, a juror. If, from those who remain, an impartial jury is obtained, the constitutional right of the accused is maintained. In this case it is not even suggested that the jury by which the accused was tried was not a competent and impartial one.' *Hayes* vs. *Missouri,* 120 U. S., 71; 7 Sup. Ct., 350. This case is cited with approval in that of *Hopt* vs. *Utah,* 120 U. S., 430; 7 Sup. Ct., 614; and they are both reaffirmed in *Spies* vs. *Illinois,* 123 U. S., 131; 8 Sup. Ct., 21, wherein the Court held that its consideration of the question of competency must be confined to ruling in respect of challenged jurors, who actually sat at the trial, and that the constitutional right of the accused is maintained when an impartial juror is obtained in the place of one challenged peremptorily for bias, and excused. As in the Hayes case, it is not even suggested in the present case that the jury by which Wooten was tried was not competent and impartial."

We have cited this case at length at the risk of being considered prolix but it seemed to state the law and the cases so pertinently so far as our contention is concerned that we felt it necessary to do so.

In conclusion we submit that the judgment of the lower court be sustained as the record is without any

errors that might be deemed prejudicial to the plaintiffs in error.

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E. H. RYAN,
Of Counsel.

No. 2005

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM ROONEY et al.,
Plaintiffs in Error,

vs.

E. T. BARNETTE et al.,
Defendants in Error.

BRIEF FOR DEFENDANT IN ERROR E. T. BARNETTE.

T. C. WEST,
Attorney for Defendant in Error
E. T. Barnette.

Filed this.....day of November, 1911.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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WILLIAM ROONEY, JOHN JUNKIN, G. W. JOHNSON and AUGUST PLASCHLART,
Plaintiffs in Error,

vs.

E. T. BARNETTE, J. C. RIDENOUR, HENRY COOK, JOHN L. McGINN, M. L. SULLIVAN, ATWELL & RILEY, a mining copartnership, composed of C. B. ATWELL and J. E. RILEY, ENSTROM BROS., a mining copartnership, composed of L. ENSTROM and O. ENSTROM, and AUGUST PETERSON,
Defendants in Error.

BRIEF FOR DEFENDANT IN ERROR E. T. BARNETTE.

Statement of the Case.

The statement of the case set forth in the brief of the plaintiffs in error seems to be correct with the exception of that portion contained in paragraph 5

on page 3 of the brief which is misleading. Cook et al. did not proceed to mine the ground after having acquired the Stafford title. They located the ground in dispute on the 25th day of March, seven months before the plaintiffs herein had any thought of locating same. They made their discovery in April immediately following their location. They therefore located over the location of Stafford and Hastings, but from the time of the location until the present day, they always remained in possession, working the grounds by themselves or their lessees and they did not intrude upon the plaintiffs in error, but the plaintiffs in error intruded both on the possession of Hastings and Stafford flowing from their valid location and upon the possession of the Dome Group such as it was.

Argument.

The plaintiffs in error ask to have the verdict of the Court below set aside on certain Assignment of Errors, which may be divided into four groups, as follows:

(a) The impanelment of the jury wherein a challenge for cause against the juror Derby was denied.

(b) The overruling of the objection of the plaintiffs to the introduction in evidence by the defendants of exhibit "H" which was a deed dated December 15, 1909, from R. C. Wood to the defendants.

(c) The refusal of the Court below to direct a verdict for the plaintiffs.

(d) Certain instructions requested by the plaintiffs and refused by the Court and certain instructions given by the Court.

While counsel for the plaintiffs in error do not take up the Assignment of Errors in the order in which they are made, counsel for this defendant in error, E. T. Barnette, will endeavor to follow the alleged errors in their chronological order.

It is respectfully submitted that the challenge for cause of the witness Derby was properly denied. The objection to this juror was based solely on the ground that he was not an inhabitant of the District of Alaska. The examination of Derby can be found at pages 49 to 56 of the Transcript of Record and from this examination it will be seen that this man resided in the District of Alaska for a period of six years prior to the time of the trial. His business was shown to be steamboating on the inland waters of Alaska. The testimony shows that Derby was employed under a yearly salary (Transcript of Record, page 51); that he had never been out of Alaska for a period of about eleven months prior to the time of the trial (Transcript of Record, page 52), and that his employment did not necessitate his remaining in Alaska during the winter. It must be remembered in deciding the question of who is or is not an inhabitant of Alaska, the conditions of residence in that country are peculiar as there are but

few occupations that can be followed uninterruptedly for each of the twelve months of the year, and if everyone was disqualified from serving as a juror who left Alaska each winter to come to the outside, it would be practically impossible for any twelve American citizens to be found in any Alaskan District who could meet the requirement contended for by counsel for the plaintiffs in error. Owing to climatical conditions, it is an absolute necessity for the inhabitants of that territory to go outside to recuperate and to escape the intense and bitter cold of midwinter. This is recognized by all classes of people in Alaska, including the Judges of the United States Courts and Court employees, who usually leave Alaska for a few months of each year and no doubt this was in the mind of the Court when he found as a fact that Derby fulfilled the requirement of the statute. It is also to be noticed in the case of Derby that ever since his first going to Alaska he had never registered as a voter outside of that territory. He states that he had not voted outside for a number of years (Transcript of Record, page 53). That he had never been outside a sufficient time to gain a vote. He was then asked, "Do you vote in Alaska?" and he answered, "Yes, sir". He was then asked where, and he answered here in this town. That was in the winter of 1905 and 1906 and was the last occasion on which he had voted anywhere (Transcript of Record, pages 53 and 54). Derby's testimony also shows that he was asked whether or not he owned a home in San Francisco,

he answered, "No, sir", and went on to state that he stopped at a hotel principally there, and that sometimes he visited his friends and relatives in San Jose, Cal. It is submitted in any event that the question of whether or not Mr. Derby was an inhabitant of Alaska was one of fact, to be determined by the Judge before whom his examination took place, and that the fact having been found to be that he was an inhabitant, it is not open to discussion in an appeal of this nature, but in any event we contend that Derby brought himself within the technical legal definition of an inhabitant of the district.

Assignment of Errors No. 2, referring to the admission in evidence of exhibit "H", page 239, Transcript of Record, is not discussed by counsel for the plaintiffs in error in the brief, and we therefore take it for granted that they have abandoned that particular phase of the case. Exhibit "H" was a deed dated December 15, 1909, from R. C. Wood of Fairbanks, Alaska, to the defendants Sullivan, McGinn, Barnette, Ridenour and Cook, and was very properly admitted by the Court as showing an outside title to the land in controversy. This we believe was clearly admissible inasmuch as this is an action in ejectment and as the plaintiffs in error do not urge the objection to the admissibility of that deed in their brief, we do not deem it necessary to further discuss that phase of the case.

The next Assignment of Error raises the question of whether or not the Court erred in denying the

plaintiffs' motion for a directed verdict. As the question involved in this Assignment or Error seems to be discussed by counsel for the plaintiffs in error in connection with their discussion of the instructions given and refused by the Court below, it is not necessary for us to specifically argue the question of whether or not this motion should have prevailed as it is covered in the further discussion of the instructions.

Lastly we come to the question of the instructions requested by the plaintiffs in error and refused by the Court and to those instructions given by the Court and objected to by the plaintiffs in error.

Counsel for this defendant in error does not desire to attempt to impose upon the Court the necessity of reading a discussion of each particular instruction complained of by the plaintiffs in error, but will endeavor to show that under the evidence adduced upon the trial the instructions were sufficiently clear and stated the law with sufficient exactitude to clearly place before the jury the two essential facts to be decided, namely, whether the defendants in error were entitled to a verdict by reason of either the Dome Group location or the Hastings-Stafford location.

It is difficult for counsel for defendants in error to tell at this stage of the proceedings upon which of the two grounds the jury based its verdict in favor of the defendants in the Court below, whether on the strength of the Dome Group location or that

of the Hastings-Stafford location. He will endeavor to show, however, that they could have rendered such verdict on either ground, and be justified, and will endeavor to show also that the instructions of the Court upon these two issues were according to law.

It is true that this Honorable Court, in Cook v. Klonos, 164 Fed. 529, rendered an opinion to the effect that the Dome Group location was tainted with suspicions of fraud, and that the nonsuit of the Court below, in that case, should be sustained upon these grounds, yet this judgment as modified at the rehearing held that fact did not cancel the location, it merely held that as six of the locators had lent themselves to a fraudulent transaction their share of the grounds being 120 acres, should be void. The whole location was not made void, only 120 acres of it, and it follows that it was not void when made but merely voidable. It was made void by the judgment rendered by this Court, in so far as these 120 acres were concerned. That left 40 acres for the two innocent locators. They could select 20 acres each or 40 acres together, and maintain their rights thereto, if they had kept their rights alive from their initiation to the day of the opinion. They were permitted to file a supplementary bill and take or submit to further proceedings, but that was in the suit of Cook v. Klones, not in the suit of Rooney v. Barnette, as the record shows. Shortly after the nonsuit below in Cook v. Klones they acquired by purchase at a very high figure, all the rights of the

defendants in that suit, as well as the complaint itself, and thus bought their peace. There was no need for supplementary bills or further proceedings, therefore they simply selected their 20 acres apiece, or at least Ridenour selected his 20 acres, being part of this very claim, and they had done all they were in law and duty bound to do to save their rights, under the opinion of the Court.

Why the Court below ruled that Ridenour in so doing had not complied with the law, is not shown in the record, but this is immaterial under the present discussion, and we merely mention it to make this discussion clear to the Court.

Now then, the plaintiffs themselves, as they set forth in their brief at page 4: "Deeming it advisable " to show also, in their case in chief, the invalidity " of the Dome Group Association Claim", and as shown at pages 67 et seq. of the Transcript, chose to submit to the jury as a new issue of fact the question as to whether or not the Dome Group Association Claim was totally void by reason of the fraud of Barnette and the six locators, and also by reason of the participation of Cook and Ridenour in said fraud.

After having submitted this evidence to the jury and sought their decision upon that issue, they requested the Court to direct a verdict in their favor and, regardless of the jury, to find as a fact that not only Barnette and his six locators had acted fraudulently but that Ridenour and Cook also should

be visited with the penalty of having the claim made entirely void and not merely the excess. Upon this they failed and the Court properly refused to give them such a directed verdict, but very properly left the question of facts to be decided by the jury under proper instructions, with the result that the jury rendered the verdict in favor of the defendants.

Since these defendants acquired the title of Hastings and Stafford, it is obvious that they have the right to rely upon both titles, namely, the Dome Group, as well as the Hastings and Stafford title, each of which titles was submitted to the jury so as it would be passed upon as to its validity and was sustained by their verdict.

The next question at issue therefore is the Hastings-Stafford title. It seems a loss of time to discuss, in order to sustain, findings of facts by a jury. No serious contention is made by the plaintiffs in error that the Court's instructions are erroneous but the arguments of counsel are directed against the finding of facts of the jury, to wit: that the discovery made by Stafford was sufficient in law.

Surely counsel for plaintiffs in erorr cannot seriously contend that discovery can be accurately defined and measured out in all cases. We think that it is such finding of mineral as will justify the prospector in spending his money and time, trying to develop a mine. It is not necessary that that prospector should be a skillful miner or that his judg-

ment should be infallible. If this prospector furnished any evidence showing that he was confident that the ground was good enough to develop, the finding of mineral, which put him in that frame of mind, would constitute a discovery. What better evidence could be furnished than the evidence of Stafford, who, after having panned and found mineral, paid $250.00 for the property, which was at that time perfectly unknown. He knew that it was an auriferous creek, that the claim, although being a side claim, was about midway in the valley between the hills surrounding it. He knew that he was in a mineral country at large, and he knew by his panning, that such erosion of the summits had taken place as had caused gold to be washed on the claim and thought that as the process of erosion had taken place for probably millions of years prior to his panning, the same process which had caused gold to be washed on that claim where he found it had probably caused a heavier wash to be deposited in the understrata. Is it to be contended by counsel for the plaintiff that before a prospector can be justified in locating a claim he should be compelled to spend several thousand dollars in sinking a shaft to bedrock? Even then there is no certainty that in sinking such shaft, at the cost of several thousand dollars, the prospector will land squarely on the pay. Indeed it is shown in the record that Cook and Ridenour in their deep shaft found only a few colors, just the same as Stafford. Is it to be contended that after having sunk such a shaft any

other prospector who would sink another shaft and land on the pay would disprove the first locator and take from him all his improvement work, as well as of his claim? Is there any reason why a few colors found in a gulch concentrated by the natural erosion would not constitute a discovery and that a shaft sunk to bedrock and failing to land on the pay, where, moreover, a few colors were panned on the way down, would be a better discovery? Is it necessary that the discovery must consist of the finding of mineral in paying quantities in a country like Alaska, which is all mineralized, where the diggings are as a rule deep and costly, where there is nothing to indicate, in our generation, where the creek originally ran, because of the continuous process of sluffing in the summer when the rays of the sun and the accumulations of muck on top of it forces the creeks and watercourses to overflow into the valleys? In other countries it is the reverse, and creeks and watercourses retain pretty well their original courses. This condition, peculiar to Alaska, is altogether due to the decayed vegetation, called muck, which overflows the whole country and the process of decay is stopped so soon as the muck becomes frozen in the winter. We submit that the discovery consists of the finding of mineral within the exterior boundaries of the claim in such place, manner, condition and quantity as will justify the prospector in doing further work. Stafford thought he was justified and paid the purchase price of the property. He was not mistaken in his surmise as the claim

proved to be valuable. He paid $250.00 for the whole and sold it out again at the rate of $40,000.00. The evidence discloses the fact that gold to the value of several hundred thousand dollars was laying in the claim, showing that his confidence was well founded. It is to be noted that the plaintiffs in error were of the same frame of mind. We mean that all parties before the Court thought it was mineral ground. There is no evidence to show that the plaintiffs in error did any panning whatever. In fact they entered apparently not knowing whether or not there was any gold on the claim either on the surface or underneath, but they entered because they knew that the creek was auriferous. They knew or should have known of two previous locations, the one of Hastings and Stafford, and the one of Cook et al. They knew that a suit had been started between Cook et al. and Stafford et al. They knew, or ought to have known, that Stafford had purchased the claim. Nothing of all that deterred them. They thought to slip in between these competitors and, regardless of the rights of the parties, located. Counsel for the plaintiffs in error claim that they located because they knew that the Hastings location had no discovery and that Stafford did not relocate and put up stakes. Said counsel further contends that they knew that the Cook location was fraudulent. Such a contention is as ridiculous as it is impossible to believe. They could not have known of any fraud, which at that time was not

contemplated. They could not have known of the lack of discovery from Stafford as they never tried to pan in the gulches and make any discovery themselves, at least their record does not show it. We do not wish to go into an extended argument over this matter, that has been so frequently taken up by this Court, and fully determined.

Now then, the plaintiffs in error contend further that Woodward marked for Hastings nothing but stakes and recorded without making any discovery and that Stafford, if he made any discovery, could not avail himself of the staking of Woodward. This is an attempt to distort the facts. The evidence is quite clear that Woodward marked the boundaries of the claims by means of stakes and blazing, in such a manner that the said boundaries could be easily determined. The evidence is not clear upon any discovery by Woodward for Hastings, but the said evidence does not by any means disprove or contradict any discovery by Woodward for Hastings. Woodward had left the country for Central America, but at the time of the location caused a notice to be filed which set forth that discovery was made on the claim. We do not pretend to urge that discovery ought to be presumed without further proof than the fact set forth in the notice, but we would say that it has not been disproved. Of course we do not claim that it was the plaintiffs' burden and will not attempt to do so. It was our burden to show a discovery. The evidence on record, however, shows that Hastings, Woodward and Ridenour

delegated Stafford and requested him to go on the ground and make a discovery, as they themselves, as they put it, had some doubts, by reason of some previous litigation on what constituted a discovery. Under that request Stafford, after having acquired an interest in the claim by reason of his option on the grounds, panned and discovered gold. That was a year and a half before the entry by the defendants in error and six months before entry by the plaintiffs in error. After having become the full owner of the claim, he again went on the ground, and again panned and again discovered gold, and the jury, believing this testimony and under the instructions of the Court, believing that he was justified in calling it a discovery, rendered a verdict in favor of the defendants.

It is probable that the plaintiffs in error have not read the late decision upon the right of a prospector to convey his inchoate rights in a location prior to discovery. Chrisman v. Miller held that a prospector had such a right, the Yard ruling was to the contrary, but of late the California Courts in Merced Oil Mining Co. v. Patterson, 153 Cal. 624, held that such a sale or transfer or assignment vested in the purchaser or assignee a good right to perform and complete the location in fulfilling the lacking essentials, and that upon his having done so, the location was as complete as if it had been done by original locators and the equitable right to the land passed to the assignee and was good and valid

against all people, and equivalent to the legal title save and except the United States.

It is interesting to note that the very matter of these discoveries on Dome Creek was fully investigated and decided in other litigation.

Cook et al. & Johnson et al., 3 Alaska 506.

In this case the trial lasted three weeks and probably a hundred witnesses were examined.

The plaintiffs were the same defendants as in the case at bar. Stafford was one of the defendants and the question of location of the Dome Group Association Claim was tested before the Court as against the location of the first locators, completed by means of a surface discovery. A gulch adjoining the gulch mentioned in the record in this case, although not quite so deep as the place where a discovery was made by one Juntilla. A great many witnesses were brought forth, some for the plaintiffs, to the effect that gold could not be found on the surface, some for the defendants, to prove that gold could be found in every pan when carefully panned. The Court, for the purpose of satisfying itself as to the truth of the allegation and testimony, went upon the ground with one man chosen by him, and at hazard designated to him the place where the prospector should pan. This was done, in the presence of the Court, with the result that gold was found in a great many pans in such quantities and under such conditions as to satisfy the Court that a

discovery had been made. There was no jury to decide the case, and upon having so found the Court entered judgment in favor of the defendants, sustaining the discovery. The opinion of the Judge searches all the cases of this Honorable Court as well as of other Courts and after a learned and lengthy discussion of the law and after a full examination of the evidence, the Judge came to the conclusion that there was a discovery made, taking into consideration the circumstances and peculiar conditions of the Alaskan country. The verdict that the plaintiffs in error seek now to reverse is the conclusion that the jury came to on the evidence adduced and from their knowledge of the said peculiar conditions of the country, so that we have before us a Court decision as well as the opinion of a jury of twelve men of the country who have passed upon the question of discovery on Dome Creek on the very grounds involved in this action. It is to be wondered at that the counsel for the plaintiffs herein seek to reverse this case upon such questions of fact.

For the above reasons the defendant in error Barnette submits that the judgment of the Court below ought to be affirmed.

Dated, San Francisco,
November 8, 1911.

Respectfully submitted,

T. C. West,
Attorney for Defendant in Error
E. T. Barnette.

No. 2005

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

WILLIAM ROONEY et al.,

Plaintiffs in Error,

vs.

E. T. BARNETTE et al.,

Defendants in Error.

Reply Briefs of Plaintiffs in Error.

LOUIS K. PRATT and
ROBERT W. JENNINGS,

Attorneys for Plaintiffs in Error.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2005.

WILLIAM ROONEY et al.,

Plaintiffs in Error,

vs.

E. T. BARNETTE et al.,

Defendants in Error.

Reply Brief of Plaintiffs to Brief of Defendant Barnette.

In the Statement of the Case contained in said defendant's Brief, fault is found with the Statement of the Case made in plaintiffs' opening Brief, in that it is alleged in said defendant's Statement of the Case that Cook et al. did not proceed to mine the ground after having acquired the Stafford title.

Our answer to that criticism is, to call attention to paragraph 6, page 65 of the Printed Record.

On page 8 of said defendant's Brief occurs the following: "Now then, the plaintiffs themselves, as they set forth in their Brief at page 4, 'deeming it advisable to show also, in their case in chief, the invalidity of the Dome Group Association claim,' and as shown at pages 67 et seq. of the transcript, chose to submit to the jury as a new issue of fact the question as to whether or not the Dome Group Association claim was totally void by reason of the fraud of Barnette and the six locators, and also by reason of the participation of Cook and Ridenour in said fraud.

After having submitted this evidence to the jury

and sought their decision upon that issue, they requested the Court to direct a verdict in their favor."

Plaintiffs agree that it was not incumbent on them to attack, in their case in chief, the Dome Group location, and that the more orderly procedure would have been to attack it in rebuttal; but the matter is not important, as no harm was done or could have been done by the reversal of the usual order of proof. It is neither necessary nor proper to explain why the reply is an *Amended* Reply, nor why *evidence of the allegations of that Amended Reply* was introduced by plaintiffs in their *case in chief,* for it is matter *dehors* the record. The evidence was all in the case, and will be considered as if it came there in the regular order.

Plaintiffs moved the Court that the *entire defense* of the Dome Group Association claim be withdrawn because of no evidence contradicting the evidence as to its invalidity, and that motion was denied, whereupon plaintiffs went to the jury. We cannot see that anything was waived by so doing.

On page 12 of said defendant's Brief the statement is made that plaintiffs knew that a suit had been started between Cook et al. and Stafford et al., and also that they ought to have known that Stafford had purchased the claim from Hastings.

On the contrary, plaintiffs knew nothing whatsoever of any such suit or of any claim of Stafford, and there is nothing in the record which at all intimates that they did so know. The record does not show that a *lis pendens* of #278 was filed nor that Stafford was ever seen on or about the claim prior

to 1906, nor that the option which he acquired from Hastings was ever recorded. The record does show that his deed from Hastings was *not* recorded until two days after Rooney staked and went into possession.

On the same page it is stated that plaintiffs did not know of the "dummy" character of the Dome Group, but sought "to slip in between these competitors."

Our answer to that is to call attention to paragraph 8, page 65 of the Printed Record.

On page 13 of said defendant's Brief the statement is made that Woodward marked the boundaries of the claim by means of stakes *and blazings.*

There is not a particle of evidence in the case that Woodward did anything but set up six stakes and record a location notice.

If it were proper to travel out of the record, as defendant has done in this case, and bandy epithets, plaintiffs could a "tale unfold" as to who is endeavoring to circumvent the laws of God and man, and of the means used to do it, such as would make the words "jumper" and "seeking to slip in" *seem* to be that which in fact *they are*—i. e., "sound and fiery, signifying nothing."

Reply Brief of Plaintiffs to Brief of Defendants McGinn, Sullivan, Cook and Ridenour.

On page 4 (top) of said defendants' Brief, it is stated that it appears from the evidence *of plaintiffs* that a discovery had been made on the Dome Group Association claim by the locators thereof.

This statement is incorrect. The only portion of the record which could by any possibility relate to

this matter is found on page 65, and is "That at that time they knew said claim No. 3 was *within the boundaries* of the land claimed to have been staked by the Dome Group Association."

Care was taken that *plaintiffs should not* be put into the position of proving a discovery by defendants. This is perfectly apparent from the colloquy found on pages 107–111, incl., of P. R.

Plaintiffs, in this Reply Brief, will, in the order in which the Assignments of Error are grouped in the opening Brief, consider the contentions which said defendants urge in their Brief.

ERRORS Nos. 4 and 14.
Plaintiffs' Opening Brief, page 20.
Defendants' Brief, page 10.

These assignments are to alleged error of the Court in not withdrawing the entire defense of the Dome Group Association claim.

Defendants' Answer thereto is, that said defense was a valid and effective defense, and should not have been withdrawn, and, as sustaining said answer, said defendants advance two propositions:

1. No one but the Government can raise the question as to the invalidity of the Dome Group Association claim.

2. Conceding, for the sake of argument, that the first proposition is not tenable, yet the said association claim has not been shown to be invalid as a matter of law.

1.

Can anyone, but the Government, raise the ques-

tion of the invalidity of the Dome Group Association claim?

It would be a waste of time and effort to argue this question to this Court now, for the reason that in the case of Waskey vs. Hammer, referred to on page 29 of said defendants' Brief, the matter was fully gone into. The line of authorities and of argument here advanced were then presented to this Court by counsel for defendants, in support of the contention, and this Court decided adversely thereto. That case is now in the Supreme Court of the United States on writ of *certiorari,* and if that Court should hold that a location fraudulent and void as to the Government is yet valid as to everyone else, it might affect this case; but until such holding the decision of this Court is binding.

We might pause, however, in passing to say that if the contention of defendant is tenable, then there is absolutely no potency in the words of the statute: "No such location shall be made"; and there would be no reason for persons, desiring to "gobble up" the mining land, to resort to the device of dummy association claims—for one man could fraudulently take up 160, or any number of, acres of mining ground and none but the Government could complain, and as the Government would know nothing about the matter until application is made for patent, and as application for patent would never be made in such a case, the fraudulent locator could mine out vast tracts of the public land with none to question his right.

The location by "dummies" is no more glaring a

fraud on the Government than would be the location of 160 acres by one man without having made any discovery, and yet if none but the Government can raise the question of fraud in the first instance mentioned, then, by the same logic, none but the Government could raise the question of no discovery in the second instance mentioned.

2.

Was the Dome Group Association claim shown to be invalid as a matter of law?

Defendants have misconceived the ground upon which plaintiffs rely, in this, to wit: on page 11 of their Brief it is stated that "While not asserting in terms that the decision in the case referred to (Cook vs. Klonos, 1510—C. C. A.) was conclusive in the case at bar, counsel's statement amounts to that, and in fact the whole theory of the case as presented by plaintiffs seems to have been based upon the proposition of the conclusiveness of that case upon the litigants in the case at bar. There can be no merit in that position. Counsel could by no possibility have pleaded or introduced in evidence a judgment in the case of Cook vs. Klonos as a bar in this action," and many pages of said Brief are devoted to knocking down this "man of straw"; when the fact is, that it is not now, and never was, plaintiffs' position that the decision in Cook vs. Klonos was conclusive in the case at bar.

That decision was not pleaded nor relied upon as *res judicata*. On the contrary, in the case of Cook vs. Klonos, this Court said, at page 537 of the opinion: "E. T. Barnette testified that in March, 1905,

before the location was made, he had an understanding with Cook and Ridenour as to the ownership of the claim. They were to stake the claim, make a discovery, and put a hole to bedrock. The witness was to furnish the supplies, tools and a boiler. They were to have each one-eighth interest in the group claim. In April, 1906, this interest was increased to a one-sixth each by a deed from Barnette as attorney in fact for six absent locators. Barnette gave Cook and Ridenour the names of these six absent persons, who it appears were not residents of Alaska, but of the State of Ohio. Four of these were relatives of Barnette—two of them brothers in law, one a sister, and one a niece. Barnette wrote to one of these brothers in law and obtained powers of attorney from these six persons. The powers of attorney were all dated July 7, 1900, and they all empower Barnette to locate, enter, and take up mining claims in Alaska. He wrote to his brother in law that he expected a half interest in the claims located for these absent locators, and when he received the powers of attorney he took it for granted that he was to have a half interest from them." This Court having so declared, the aim of plaintiffs was to bring the evidence in the case at bar within the evidence which this Court had intimated was sufficient to constitute a fraudulent or "dummy" staking: not under any theory of *res judicata,* but as independent evidence in the case at bar.

Plaintiffs were at liberty to do this by any competent means in their power. If plaintiffs cared to risk matters by putting Barnette or Ridenour or

Cook on the witness-stand, they might have done so and have endeavored then and there to pry the facts from them, but plaintiffs would not be obliged to run that risk, if they had access to admissions which could be held to be binding on those defendants who alleged that the title to the ground in dispute was in those persons named in the first affirmative defense.

Plaintiffs did have access to testimony and depositions of Barnette, Cook and Ridenour in cause No. 278, and that testimony was admissible in this case to show the invalidity of the Dome Group Association location.

That this, rather than any reliance upon *res judicata,* was the object of said testimony, is abundantly shown by the record. By referring to pages 104 and 105 of the record it will be seen that said admissions were not introduced on the theory of *res judicata.*

The admissions against interest in Cook vs. Klonos are all that were read by plaintiffs' counsel, and counsel for defendants claimed, and were accorded, the right of reading such other portions of the testimony of Barnette as, in the opinion of said defendants' counsel, explained or modified those admissions. (P. R. 156. Mr. McGinn first claimed the right in connection with the deposition of Barnette at page 84 of the P. R. See P. R. 85—top; P. R. 107, 121, 132.)

Where, then, is the justification for the statement (on page 12 of defendants' Brief) that "the testimony in the Cook-Klonos case was entirely different from that introduced here upon the proposition of the fraudulent inception of the Dome Group claim, and

only a portion of—excerpts from—the deposition and testimony in that case was introduced in the case at bar, notwithstanding counsel's assertion that there was no modification in the testimony herein? As a matter of fact the testimony in regard to the making of the Dome Group location upon this point was entirely different from that involved in the Cook-Klonos case.

The testimony of Barnette in the Cook-Klonos case as to the "dummy" character of the location of the Dome Group Association claim was *not* essentially different from that introduced in this case on the same subject, the assertions of defendants' counsel to the contrary notwithstanding. It was the identical testimony—it was such admissions as plaintiffs' counsel thought fit to introduce, supplemented by such testimony as, in the opinion of defendants' counsel, explained or modified those admissions. If there was any other modification of such admissions, defendants' counsel would have produced and read them. In other words, what was introduced in this case were the admissions of Barnette, agent of and witness for the absent locators of the Dome Group. Those admissions (meaning thereby the testimony read by both plaintiff and defendant) were *not* contradicted or explained or modified by any further evidence in the case at bar except by the evidence that Cook, Ridenour, McGinn and Sullivan did not know of the fraudulent arrangement; but it is our contention that the absence of such knowledge by them makes no difference in the legal principles involved, and that on all points going to the *gist* of the

matter Barnette's testimony is uncontradicted. Thus in the case at bar it appears from the testimony therein that prior to July 7, 1900, Barnette wrote to Armstrong for the powers of attorney from him and other absent kinsmen, and that in his letter he requested Armstrong to have the powers of attorney executed and returned to him, stating his (Barnette's) terms; *i. e.,* that he (Barnette) was to have a half interest; that in answer he received the powers of attorney executed July 7, 1900. What is this but an agreement that Barnette should have a half interest (Cook v. Klonos)? The powers of attorney are very full, but they contain no dissent from Barnette's proposition for one-half. Said admissions show that, armed with these powers of attorney, Barnette employed Cook and Ridenour (who were we will assume, innocent of the said agreement) to locate in their names and in the names of Barnette's pseudo principals. (P. R. 147—middle.) This, in the language of this Court, was but "a device by which Barnette was to acquire in a single location one-half of 120 acres, although he is not a locator by name, of record or on the ground."

When, therefore, the trial court qualified the first part of Instruction No. 7 by adding: "If you find from the evidence that there was any agreement or understanding between any of the locators and E. T. Barnette that said Barnette should own more than 20 acres of the said Dome Group Association claim," it submitted to the jury the determination of a fact as to which the evidence *was* all one way, and when the Court further added: "provided that such agree-

ment or understanding was made or entered into *prior* to the consummation of said association location," it but repeated the error; for the evidence *was* all one way, that the iniquitous contract was entered into *prior* to the consummation of said association location—the evidence being that the location was consummated by Ridenour's discovery about April 15, 1905 (P. R. 169), whereas the powers of attorney were executed on July 7, 1900, and were in Barnette's possession, in conformity with his said letter, at the very time he made the arrangement with Cook and Ridenour to stake the claims, which was some time in March, 1905. (P. R. 147—middle; P. R. 83—bottom.)

ADMISSIBILITY OF BARNETTE'S TESTIMONY.

When, therefore, counsel (on page 25 of the Brief) say: "We confess we cannot see what evidence was all one way unless it was that there had been no actual agreement with any of the locators of the ground with E. T. Barnette, who was not a locator," we are forced to the conclusion that counsel do not consider the testimony of Barnette in case No. 278 as being admissible in this case. If that be the contention, there are two answers thereto, to wit:

(a) Said testimony was admissible.

Barnette is one of the defendants in the case at bar; he is one of the persons who here plead that the Armstrongs, Newton, Sumner, Selkirk, Cook, Ridenour, McGinn and Sullivan own the Dome Group Association claim embracing this claim, and who set up in evidence the Dome Group location.

He has admitted certain facts touching the legality of the very title on which he relies in this defense. The circumstances of those admissions fully appear. Are not his own admissions, no matter when or where made, admissible *against him* at least? Surely, the contrary will not be contended.

Such admissions are evidence *against Cook and Ridenour*, for they also are defendants in this case, and they, likewise, assert that the Armstrongs, Newton, Sumner, Selkirk, Cook, Ridenour, McGinn and Sullivan own this claim by virtue of the Dome Group Association. They were plaintiffs in cause No. 278; they brought forward Barnette as a witness therein; they introduced him to the Court; they sought the action of the Court based on his testimony. His admissions are their admissions by adoption; not conclusive—rebuttable, it is true, but *in this case they were not rebutted.* (2 Wigmore on Evidence, sec. 1075.)

Were said admissions admissible as against McGinn and Sullivan? If Armstrongs, Newton, Sumner, Selkirk were defendants in this case, if they were here asserting that they owned this claim by virtue of the Dome Group location, the said admissions of Barnette would be admissible against them. They are not here, however, but, in their stead, appear McGinn and Sullivan, who join in the pleading of the first affirmative defense, saying that Armstrongs, Newton, Sumner, Selkirk, Cook, Ridenour, McGinn and Sullivan are owners of this claim by virtue of the Dome Group location, but defendants introduce no *evidence* of legal title in McGinn and

Sullivan coming through the Dome Group locators—the evidence on that point being only that McGinn and Sullivan are entitled to a third interest by virtue of an agreement made with Barnette, the would-be perpetrator of the fraud, as attorney in fact for his accomplices, to allow them (McGinn and Sullivan) that *quantum* of interest, to wit, one-third, for attending to the litigation necessary to put the fraud through. (This is said without meaning to intimate that McGinn and Sullivan *knew* of the fraudulent design of Barnette.) If there is no evidence that any part of the title arising from the Dome Group location is vested in McGinn and Sullivan by conveyance from or through the locators thereof, then McGinn and Sullivan are not claiming by virtue of that location, and it would matter not whether the admissions of Barnette are or are not evidence against them. On the other hand, if it be contended that the title arising from the Dome Group location is in part vested, legally *or equitably,* in McGinn and Sullivan, it is difficult to see how Barnette's testimony could be inadmissible against McGinn and Sullivan and yet admissible as against those who, under such assumption, would be their source of title or right; for McGinn and Sullivan's title from said fraudulent locators could be no purer than the title of those same locators. If the title of these locators is invalid on account of the fraud, they could convey no good title to McGinn and Sullivan by reason of having employed them as attorneys to protect them through the courts; and this, whether McGinn and Sullivan did or did not know of the

fraudulent arrangement, or whether the agreement for fee was made before or after the location. Consequently, it seems to us, that all that part of defendants' Brief which is devoted to showing that McGinn and Sullivan were innocent and that the arrangement for fee with them was made after the location, is but saying "an undisputed thing in such a solemn way," for the record shows no controversy on that point. We maintain that there can be no such thing as an "innocent purchaser" of a mining claim which is invalid for fraud or for want of discovery or for any other reason; if there could be such a thing, claims could be located without discovery and a conveyance to one who did not know that no discovery had been made would validate the location.

(b) But even if the testimony of Barnette were inadmissible, defendants are in no position to raise that question on this writ of error. This is not their writ of error. They got the judgment; which is all they asked for. They can assign no cross-errors because they can sue out no cross-writ of error. (Guarantee Company of N. A. vs. Phenix Ins. Co., 124 Fed. 173.)

The law of this case at this stage of the proceedings is that the evidence was properly admitted, and the only questions are, *Was* that evidence contradicted? and *What* does it prove?

We contend that the record shows that said evidence was absolutely uncontradicted on any vital point, and that, the evidence being uncontradicted, it proves the "dummy" character of the location.

(Cook vs. Klonos, *supra.*) It is true, there is the evidence of Cook and Ridenour in this case (not present in Cook vs. Klonos) that they did not know of the fraudulent arrangement; but, as contended in our opening Brief, "the only potency such denials could have (even if given full credit) would be to establish the right of Cook and Ridenour to select Claim No. 3 under the power of selection mentioned in the modified opinion of this Court in Cook vs. Klonos, heretofore referred to; but Ridenour never brought himself within the terms of that modified opinion, and all evidence as to any selection made by him was withdrawn (P. R. 340), and, as for Cook, there never was any claim that he had made a selection"; and it is equally true that the record of the case at bar shows affirmatively that McGinn and Sullivan did not know of the fraud in the location and did not make the arrangement for fee until after the fraudulent location was made, but it is not apparent how one-third of the *res* of a fraud can be purified by the perpetrator of the fraud agreeing to give that one-third to an attorney for legal skill exercised by that attorney to secure the retention to said perpetrator of a portion of the remainder of the fraudulent acquisition.

ASSIGNMENT No. V.

Plaintiffs' Opening Brief, p. 21.

Defendants' Brief, p. 29.

The Stafford Title.

Conveyance of Location with Discovery—

The cases of Miller vs. Chrisman, 140 Cal. 440, and of The Merced Oil Mining Co. vs. Patterson,

153 Cal. 624, are cited in defendants' Brief (p. 36) as holding that before discovery a locator has something which he can convey. We sought in our opening Brief to show that in Miller vs. Chrisman it was the *possession* which was valuable, and which conferred the right of possession, and which could be conveyed, and we called attention to the fact that in that case the associates were *in possession,* and to the language of the Court in said case, and to the language of the same Court in Weed vs. Snook (77 P. R. 1023) commenting on Miller vs. Chrisman.

It is not apparent to us how defendants can derive any consolation from the other case cited, to wit, Merced Oil Mining Co. vs. Patterson (96 P. R. 90), for in that case it appears:

(a) That Spinks and his seven associates were *in possession and proceeding with the work of development.*

(b) That before discovery, but while still in possession proceeding with the work of development, they conveyed to the Merced Co. and to Castle forty acres each; that is, they abandoned and gave up possession of those forty acres. However, said abandonment and giving up of possession was, in the case of *the Merced Co.,* made upon the express understanding and agreement, and on the *consideration,* that any discovery which the Merced Co. might make on the said forty acres should inure to the benefit of the whole claim, but in the case of the conveyance to Castle, there was no such understanding, agreement or consideration. Of such an agreement the Court said: "It cannot make any difference that the conveyance to the party who is so to develop the land

is made before or after discovery, *provided* that it be understood between them that, *as part of the consideration,* the work done and the discovery when made shall be for the benefit of the whole claim. As parol evidence is always received to show the true consideration of a contract, this part of the consideration may rest upon an oral agreement of the parties, and need not, therefore, be embodied in the deed. As in the case of quartz locations, it is permissible for two locators to join in sinking a shaft or driving a tunnel within the boundaries of their locations in their effort to strike the vein or lode, with the result that the work so done is deemed in law to have been done on and for the benefit of their respective locations; so in these placer locations no reason is perceived why the parties may not make a conveyance of a divided as well as an undivided interest, to the end that the grantee may prosecute the work of discovery *for the benefit of all.* But, upon the other hand, while the distinction made may perhaps be regarded as over-refined, nevertheless logically the contrary of the proposition is equally true, that if such conveyance be made, without any such understanding, it is in law no more than a surrender and abandonment of the possessory rights which the original locators had, and the establishment, in effect of a new and independent location in their grantees." (96 P. R., p. 92, 1st col.)

(c) The Merced Co. evidently *went into possession* of its forty acres, and discovered. It does not appear that Castle did any such thing.

(d) The Merced Co. and Castle joined in a single

action as deriving title from a common source against Patterson, who claimed by a later location.

(e) "Upon the trial the Court adopted, as the correct interpretation of the law, the theory of plaintiffs, namely, that the consolidated claim of Spinks and his associates to the 160 acres constituted a single claim, with the right of possession in Spinks and his associates, and their grantees as against attempted relocations, *made while they were actually in the possession of the land and diligently prosecuting the work for the discovery of oil.*" *(96 P. R., p. 90, 2d col.)*

(f) The trial court entered a decree for both the Merced Co. and for Castle, clearing their title and enjoining Patterson. Patterson appealed.

(g) The Supreme Court of California affirmed the decree as to the Merced Co. and reversed it as to Castle, saying: "Coming to apply this principle to the facts in the case, if as a part of the consideration of the deed to the Merced Oil Mining Company it was understood and agreed between the parties that the labor done and money expended upon the Merced Oil Company's 40 acres should operate for the benefit of the land remaining in the possession of the associates, such effect would be legally given. And, in turn, the value of the work and the resulting discovery would redound to the benefit of all subsequent grantees of the associates. In this sense must be understood the declaration in Weed vs. Snook, 144 Cal. 439, 77 Pac. 1023." (96 P. R., p. 92, 1st col.)

The Merced case is, it seems to us, an authority in our favor rather than an authority against us. It

but accentuates the importance of possession and of the diligent "prosecution of the work for discovery"; it confirms the comment of Weed vs. Snook on Miller vs. Chrisman to the effect that that case would have been very different if the associates had not been in possession and prosecuting the work of development at the time plaintiffs entered; and, from the fact that the Court affirmed as to Merced Co., which had a positive agreement as to any discovery or expenditure it might make, and reversed as to Castle, who had no such agreement as to any discovery he might make, the action of that Court in the case at bar would not be hard to forecast.

There is a late case in the California court decided in November, 1910, not cited by us in the opening Brief, but which we would like to cite at this time. The case is McLemore vs. Express Oil Co., 158 Cal., p. 563. The case cites Miller vs. Chrisman and says: "What the attempting locator has is the right to continue in possession undisturbed by any form of hostile or clandestine entry *while he is diligently prosecuting his work to a discovery,*" and the Court then goes on to define the meaning of diligent prosecution of the work of discovery, saying that it does not mean "the doing of assessment work—it does not mean the pursuit of capital to prosecute the work—it does not mean any attempted holding by cabin, lumber pile or unused derrick—it means the diligent, continuous prosecution of the work, with the expenditure of whatever money may be necessary to the end in view." The case shows conclusively that it and Miller vs. Chrisman and Weed vs. Snook are based upon

the fact that the continuous possession and searching for a discovery is the only thing of value to a location-before-discovery, and is what the Court meant when it said "they have then this right of possession and with it the right to protect their possession. * * * We cannot perceive why these rights may not in good faith be made the subject of conveyance by the associates as well before as after discovery."

The opinion goes further; intimating that in the case of an ordinary placer, the rule is different, but that the modification as to location without discovery has been made by the Courts who were confronted with serious difficulty to fit the placer mining laws to the exigency of oil locations. The language of the Court is (158 Cal., p. 562): "As has been said, in the case of other minerals, discovery preceded the demarkation of the boundaries and the posting and recording of the notice. In the case of oil, discovery, in the very nature of things, would rarely or never be made except at the end of much time and after the expenditure of much money, the discovery of oil involving the erection of a derrick, the installation of machinery and the laborious drilling of a well, frequently to the depth of three thousand feet or more. If, therefore, the placer mining laws, which were declared by Congress to be the only laws under which oil locations could be established, *were to be made of any practical benefit to the oil locator,* it must be by permitting him to mark the boundaries of his location and post and record his notice, *and by protecting him in possession while he was with dili-*

gence prosecuting the labor of digging his well to determine whether or not a discovery could be made. So it was held by the federal courts, by the courts of some of the other States, and by this court in Miller v. Chrisman."

It is then, we take it, the law that the locator without possession or discovery has nothing to convey. In our opening Brief there were cited several cases, holding that the location without discovery is nothing. Those cases were:

Hanson vs. Craig, 170 Fed. 65;
Sierre vs. Home, 98 Fed. 676;
Olive L. & D. Co. vs. Olmsted, 103 Fed. 571;
New England vs. Congdon, 92 P. R. 181 (Cal.);
Gemmel vs. Swain, 28 Mont. 331;
McLaughlin vs. Thompson, 29 P. R. 816;
Redden vs. Harlan, 2 Alaska, 406;
Bulette vs. Dodge, Id. 429.

And it seemed to us that they established the proposition here contended for, to wit, that Hastings never having discovered or taken possession had absolutely nothing to convey. Defendants meet these citations by the simple *ipse dixit* that they are inapplicable (Defendants' Brief, p. 37, top), and by the citation of authorities which hold that: "The marking of the boundaries may precede the discovery or the discovery may precede the marking, and if both are completed before the rights of others intervene, the earlier act will inure to the benefit of the locator" (Defendants' Brief, p. 35)—a proposition which we do not assume to controvert, although there are some cases holding to the contrary of the cases so cited.

We make no contention against the proposition that if the staking and marking were done *by or for Hastings* and the subsequent discovery (assuming that one was made) was *by or for Hastings,* Hastings' location would, in the absence of intervening rights, be good and valid, nor do we at all question the doctrine laid down in Irving vs. Porego (93 Fed. 608) and the other cases cited on page 35 of defendants' Brief to the effect that a *locator* may stake first and discover afterward. No case, however, has been cited holding that a claim is perfected when the locator had no discovery and took no possession, and a discovery was made by another who does not mark his boundaries; nor do we at all controvert the proposition that a claim may be located by agent. These propositions are but other "men of straw" set up by defendants and by them bowled over.

STAFFORD WAS *NOT* HASTINGS' AGENT.

Defendants' "last stand" is that Stafford was *Hastings'* agent to make a discovery for Hastings.

Hastings does not testify that Stafford was his agent; Roth does not so testify; Woodward does not so testify—neither does Stafford; and these are the only persons who could have knowledge on the subject. The only testimony on this subject referred to in defendants' Brief is the following: "Woodward told me that I had better go out and there was a gulch on the lower end of the claim and make a discovery myself, as he did not understand really what a discovery was. There was some question at the time about it—he said go and satisfy yourself [Tr. 204]," (Defendants' Brief, p. 30—bottom), and it is

submitted that that testimony establishes no agency. There is, however, other testimony in the case, from which it conclusively appears that Stafford was not Hastings' agent, but that he made the alleged discovery for himself thinking that he had acquired something from Hastings. Attention is called to pages 268, 269 of the P. R., where on cross-examination Stafford gave the following testimony:

"A. I said Roth and Woodward, when I was talking to them, said that I better go out and investigate the ground and satisfy myself as to discovery.

Q. And make a discovery of your own?

A. Yes, sir.

Q. And you went out there to do that, did you, afterward? A. I went out there to investigate.

Q. To make a discovery yourself?

A. Yes, sir, to satisfy myself.

Q. Yes. So that, from that conversation, you must have understood they hadn't made any discovery?

The COURT.—He may answer whether he did understand that from any conversation they had.

A. I understood that Roth hadn't made a discovery.

Mr. PRATT.—Mr. Woodward didn't ever claim to you that he had made a discovery, did he?

A. I think not.

Q. And they didn't either of them claim that Hastings had made a discovery, did they?

A. They told me that they didn't know what Hastings had done on the ground.

Q. So far as Hastings was concerned, then, and a

discovery by Hastings you had no information about that?

A. I didn't know what he had done; no, sir.

Q. Yes. Now, what did you do after that—you claim, then, that you bought the ground of them, don't you? A. Yes, sir.

Q. Paid fifty dollars down on it? A. Yes, sir.

Q. And were to pay two hundred and fifty more?

A. Yes, sir.

Q. Now, then, what did you do next?

A. Well, we come over, we had a deed drawn up—or an option, drawn up at Nye's office at the time.

Q. That was a deed, was it?

Mr. PRATT.—Was that the contract read here yesterday? A. Yes sir.

Q. That's what you paid fifty dollars on?

A. Yes, sir.

Q. Now, what did you do after that?

Mr. JENNINGS.—You don't mean after he paid the two hundred and fifty dollars?

Mr. PRATT.—No, no. After you paid the fifty dollars, then what did you do?

A. Why, later on that same month I went over to Dome Creek.

Q. Well, what part of Dome Creek?

A. I went down to Three Below, first tier, right limit.

Q. What did you go there for then?

A. I went there to look over the claim, the stakes and the lines—and to do some prospecting.

Q. To make a discovery of gold there—wasn't that what you went there for too? A. If possible.

Q. If possible, yes. Did anybody go with you?

A. I think I was alone."

From which it appears that he did not prospect until he had made an agreement for purchase, and that he did not go on the ground in Hastings' interest but to satisfy himself *for himself.* If he went out for Hastings it is strange that he never reported to Hastings, Woodward or Roth.

We *know* that the *Hastings location is not based on any discovery by Stafford, for the Hastings location notice reads: "Discovered Jan. 2, 1904" (P. R. 225), and although that recital is no evidence of discovery (1 Lindley, p. 603, sec. 335; Mutchmor vs. McCarty, 87 P. R. 85), yet it is an allegation of the date of an alleged discovery on which the location is based. How, then, can it be now contended that said location is based on some other alleged discovery?*

Says counsel on page 34 of defendants' Brief: "But waiving all question of discovery aside, and answering the proposition of counsel that Hastings had nothing to convey, we submit that there was no actual conveyance made in the case until after a discovery had been made within the limits of the claim by Stafford for Hastings." This is begging the question by assuming that Stafford discovered *for Hastings,* which is the very thing to be proved. Surely, it cannot be contended that a discovery, by whomsoever made, will perfect a prior marking by whomsoever made. The person who locates must own the discovery in the sense of rightfully basing his location upon that discovery.

On page 40 of defendants' Brief counsel says: "It

is logical to suppose that had he intended to treat this discovery as inuring to his benefit and the initiation of a location for himself, he would have gone ahead and marked new boundaries or indicated that these boundaries were adopted by him. What did he do? He went to the Hastings people and exercised his option to purchase, thereby demonstrating two things—first that he was acting as the agent of Hastings when he did this act to 'perfect the appropriation' of Hastings, and secondly, that he believed the ground was mineral by reason of this discovery, and so decided to conclude a sale with Hastings for the same." We think otherwise. If the domain of speculation is to be entered, if we are to suppose what was in Stafford's mind, we think it is more reasonable to suppose that he was ignorant of the laws of this country and of the requisites of a valid title to mining ground, differing, as they do, so much from those which obtain in his own country (Canada) where discovery is not at all necessary (P. R. 257, 258). We find him coming to Alaska from Dawson, B. C., in the summer of 1904 and in September of 1904 buying Hastings' "location-without-discovery."

"Q. Several claims. Now, in that country you didn't—there was no such thing as discovery of gold, was there? That didn't have anything to do with a mining title there, did it? A. No, sir.

Q. So the first experience you had with reference to staking claims and making a discovery under the American law was when you came down here in 1904, wasn't it? A. Yes, sir." (P. R. 258.) Again, even if he had been familiar with our laws, it is not

unreasonable to suppose that the reason he did nothing was because he found "nothing encouraging," as he says at one place, for he did nothing at all until, seeing a chance to sell the nothing which he had purchased from Hastings, he makes the final payment of $200. We say this is reasonable, for it appears that on September 23, 1905, he puts on record a deed from Hastings for the "nothing" which cost $250, and on the same day he sells a three-fourths interest in this "nothing" to Miller and De Journel for $2,000.

The facts are, as shown by the record, that Hastings was the capitalist (P. R. 287), Woodward was the roving staker (P. R. 279), and Roth was the broker (P. R. 284) to sell for the capitalist whatever the staker should stake for him; that the staker staked this and *other claims* for the capitalist (P. R. 282), staking this claim without having made a discovery; that Hastings was out of the country at the time and never knew that he had this particular claim until Roth sold it for him; that Stafford purchased from Hastings that which was nothing; that Stafford found nothing to justify a location and made no location; that the Dome Group people, having lost out by the trial Court's decision, in Cook vs. Klonos, effected a compromise with Stafford, ignored Rooney, who was in the open and notorious possession of the claim and working same, mined out the ground, and now, finding that they had bought out the wrong party, seek to defend this action by the allegation of three absolutely inconsistent de-

fenses in the hope that one of those defenses may prevail.

ERRORS Nos. III and XVII.

Plaintiffs' Opening Brief, p. 39.

We can but repeat our request that the case be remanded with instructions to the Court below to enter the judgment requested.

If this Court so remands the case, defendants will not be precluded from raising the question of the admissibility of the testimony of Barnette nor the question of the validity of Ridenour's selection; they can sue out a writ of error from the judgment entered in obedience to the mandate, and, on their own assignment of errors, raise any questions not made *res judicata.*

Guarantee Co. of N. A. vs. Phenix Ins. Co., 124 Fed. 170.

Alaska Treadwell Co. vs. Cheney, 162 Fed. 594.

ERROR No. XIII.

Plaintiffs' Opening Brief, p. 40.

Defendants' Brief, p. 47.

Instruction No. VI and that part of Instruction No. V, reading as follows: "You are instructed that if any arrangement or understanding was had between E. T. Barnette and the other locators of the Dome Group Association, whereby the said Barnette was to acquire an interest in said association claim in excess of twenty acres, providing such understanding or agreement was entered into before the location of said association claim, it would render the said association claim void as to the said Bar-

nette and all the other locators who participated in the understanding or agreement whereby said Barnette was to acquire such interest in said association claim, and said claim would be also void as to all of the locators who had knowledge that said Barnette was to acquire a greater interest in said association claim at or prior to the consummation of said Dome Group location," cannot possibly be reconciled with that part of Instruction No. 5, which says: "In other words, an association location may be avoided by any agreement whereby one of the locators or other person or persons is to acquire an interest therein greater than twenty acres, provided such agreement is entered into prior to the consummation of the location," on the assumption that the Court was drawing any line between *void* and *voidable,* and was telling the jury what would render a claim void as distinguished from what would render it voidable. (Defendants' attempt to so reconcile the instructions on pages 49, 50 of their Brief.)

The Court uses the word *void* and the words *may be avoided,* interchangeably, as is perfectly apparent from the following portion of said instruction No. 5: "But you are instructed that in order that such agreement *may avoid* the Dome Group location, you must find that such agreement was entered into prior to the consummation of the location." (P. R. 339.) Here the Court uses the words *may avoid,* although he is referring to the agreement as to which he had just used the word *void;* and he attempts to sum it all up by saying, "In other words, an asso-

ciation location *may be avoided* by any agreement whereby one of the locators or other person or persons is to acquire an interest therein greater than twenty acres, provided such agreement is entered into prior to the consummation of the location." (P. R. 339—bottom.)

Such contrary instructions could not but confuse the jury on one of the most vital points in the case. We repeat the question, What is the jury to understand? Is, or is not, a knowledge or participation by *all* the locators of the iniquitous scheme requisite to establish the invalidity of the Dome Group?

Plaintiffs offered and requested the giving of instructions on this point which were not contradictory and which, as we believe, correctly stated the law, but the offered instructions were refused and exception duly taken. See Assignment of Errors Nos. IX and VI (pages 9, 7, 44 of Plaintiffs' Opening Brief).

Defendants contend that Rooney had no right to intrude on this claim of one hundred and sixty acres of the Dome Group Association because, forsooth, Ridenour was in possession. If Ridenour was in possession of one hundred and sixty acres, for whom was he in possession—for Barnette and his accomplices? If Ridenour can be held to be in possession of twenty acres only, then of which twenty acres was he in possession? His workings were on Claim No. 4. There was no valid location of one hundred and sixty acres, and there was no valid location of any part of one hundred and sixty acres, and it

is not disputed that Rooney entered peaceably and neither clandestinely nor surreptitiously, nor is it contended that he disturbed either the workings or the tent of Ridenour, or that he did not leave Ridenour room to work. Can it be contended that Ridenour, having behind him no valid location, can exclude all others from one hundred and sixty acres of mining ground or from any particular part of that one hundred and sixty acres except from that part upon which his "foot rests"? With this Rooney did not interfere.

The decision of this Court in Cook vs. Klonos did not *make* the Dome Group a dummy—it but *declared* it to be a dummy. The modified opinion in Cook vs. Klonos *conferred* no right on Cook and Ridenour —it but declared that under certain circumstances therein specified they might wage that particular suit; not that they would certainly prevail therein. That case was decided with reference only to the parties and the record which were before the Court.

The Dome Group location was a dummy—an invalid location—when Rooney located, whether it be called void or voidable. Barnette could not, by taking one or two innocent men into his fraudulent scheme, pre-empt one hundred and sixty acres of the mining ground, and neither could Ridenour, no matter how innocent he might be.

The six absent locators had no right on account of the fraud; Cook and Ridenour had no right (so far as outsiders are concerned, at least) *by that location* to any particular twenty acres; McGinn and Sullivan had no rights, because their interests, if

any, could only come through the absent locators. As between plaintiffs and defendants, therefore, the ground was not covered by any valid subsisting location.

Respectfully submitted,

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